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No. 06-770

In The
Supreme Court of the United States
October Term 2006

STATE OF FLORIDA,
Petitioner,

v.

GABRIEL HARDEN, ET AL.
Respondents.

On Petition For a Writ of Certiorari to the Florida Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Medicaid fraud anti-kickback statute makes it unlawful to "knowingly and willfully" pay or receive remuneration for furnishing an item or service for which payment may be made under the Medicaid program. 42 U.S.C. §1320a-7b(b)(2). The statute includes a safe harbor provision under which paragraph (b)(2) shall not apply to "any amount paid by an employer to an employee . . . for employment in the provision of covered items or services." Id. § 1320a-7b(b)(3)(B). An implementing regulation clarifies that the item or service must be one "for which payment may be made in whole or in part under . . . Medicaid." 42 C.F.R. § 1001.952(i).

The Medicaid statute authorizes state Medicaid fraud units to prosecute violations of state law, 42 U.S.C. §1396b(q)(3), the federal anti-kickback statute does not contain a preemption provision, and the Department of Health and Human Services has repeatedly stated that "conduct that is lawful under the federal anti-kickback statute may still be illegal under State law." The questions presented are:

1. Whether persons who received remuneration for providing services for which payment is not made under Medicaid fall within the federal employee safe harbor provision.

2. Whether the anti-kickback provision of Florida's Medicaid fraud statute is preempted by the federal anti-kickback statute.

LIST OF PARTIES

The petitioner is the State of Florida.

Respondents are Gabriel Harden, Edward Polsky, Maria Rodriquez, Bruce Eric Smith, Herbert Lee Goss, Flora Johnson, Elsa Cortorreal, Victor Rivera, Billy Madison, and Vonshella Carter.

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Florida hereby petitions for a writ of certiorari to review the decision of the Florida Supreme Court in this case.

OPINIONS BELOW

The decision of the Florida Supreme Court, dated May 18, 2006 and reported at 938 So. 2d 480 (Fla. 2006), is set forth in Appendix A, pp. 1a-25a. The order of the Florida Supreme Court denying the State of Florida's motion for rehearing and clarification, dated September 6, 2006, is set forth in Appendix B, pp. 26a-27a. The decision of the District Court of Appeal of

Florida, Third District, reported at 873 So. 2d 352 (Fla. Dist. Ct. App. 2004), is set forth in Appendix C, pp. 28a-34a. The order of the Eleventh Judicial Circuit Court is set forth in Appendix D, pp. 35a-58a.

JURISDICTIONAL STATEMENT

The decision of the Florida Supreme Court was entered on May 18, 2006. The Court denied the State of Florida's motion for rehearing and clarification on September 6, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes, constitutional provisions, and federal regulations, the pertinent portions of which are set forth below:

1. Article VI, clause 2 of the United States Constitution, provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

2. 42 U.S.C. § 1320a-7b provides in part:

* * *

(b) Illegal remunerations

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in case or in kind–

(A) in return for referring an

individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person–

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to –

* * *

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

* * *

3. § 409.920, Fla. Stat. (2000), provided in pertinent part:

409.920 Medicaid provider fraud.–

(1) For purposes of this section the term:

* * *

(c) "Item or service" includes:

1. Any particular item, device, medical supply or service claimed to have been provided to a recipient and listed in an itemized claim for payment; or

2. In the case of a claim based on costs, any entry in the cost report, books of account, or other documents supporting such claim.

(d) "Knowingly" means done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result.

(2) It is unlawful to:

(a) Knowingly make, cause to be made, or aid and abet in the making of any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the agency or its fiscal agent for payment.

(b) Knowingly make, cause to be made, or aid and abet in the making of a claim for items or services that are not authorized to be reimbursed by the Medicaid program.

(c) Knowingly charge, solicit, accept, or receive anything

of value, other than an authorized copayment from a Medicaid recipient, from any source in addition to the amount legally payable for an item or service provided to a Medicaid recipient under the Medicaid program or knowingly fail to credit the agency or its fiscal agency for any payment received from a third-party source.

(d) Knowingly make or any way cause to be made any false statement or false representation of a material fact, by commission or omission, in any document containing items of income and expense that is or may be used by the agency to determine a general or specific rate of payment for an item or service provided by a provider.

(e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate indirectly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicaid program.

(f) Knowingly submit false or misleading information or statements to the Medicaid program for the purpose of being accepted as a Medicaid provider.

A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

4. § 409.905, Fla. Stat. (2000), provides in pertinent part:

409.905 Mandatory Medicaid services. - The agency may make payments for the following services, which are required of the state by Title XIX of the Social Security Act, furnished by Medicaid providers to recipients who are determined to be eligible on the dates on which the services were

provided. Any service under this section shall be provided only when medically necessary and in accordance with state and federal law. Nothing in this section shall be construed to prevent or limit the agency from adjusting fees, reimbursement rates, lengths of stay, numbers of visits, number of services, or any other adjustments necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act of chapter 216.

* * *

(12) TRANSPORTATION SERVICES - The agency shall ensure that appropriate transportation services are available for a Medicaid recipient in need of transport to a qualified Medicaid provider for medically necessary and Medicaid-compensable services, provided a client's ability to choose a specific transportation provider shall be limited to those options resulting from policies established by the agency to meet the fiscal limitations of the General Appropriations Act. The agency may pay for transportation and other related travel expenses as necessary only if these services are not otherwise available.

5. 42 C.F.R. § 1001.952 provides in pertinent part:

§ 1001.952 Exceptions

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

* * *

(i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

STATEMENT OF THE CASE

Established by Title XIX of the Social Security Act, Medicaid is a cooperative state-federal program in which each participating state designs and implements its own program subject to certain broad standards established by federal law. See 42 U.S.C. § 1396a (prescribing general requirements of a state Medicaid plan). States invest billions of dollars every year in this health care program for the poor, elderly, and disabled. Unfortunately, fraud is rife.[1]

In this case the defendants admitted participation in a scheme whereby Medicaid dental providers paid van drivers $25 in cash for each Medicaid-eligible child solicited and transported to their dental clinic. Notwithstanding unequivocal statements from Congress and the Office of Inspector General of the Department of Health and Human Services ("HHS") that states were authorized to prosecute their own laws on fraud and that such laws were not preempted, the Florida Supreme Court held that Florida's anti-kickback or illegal referral statute, § 409.920(2)(e), Fla. Stat. (2000), was preempted by federal Medicaid law. Applying that law, it approved defendants' paying for patient referrals.

Although the relevant federal anti-kickback provisions date back as far as 1977, no court has previously accorded them preemptive effect. The decision of the Florida Supreme Court is wrong, it will have serious fiscal consequences, and it calls into question the legitimacy of Medicaid fraud laws in at least 32 other states that, like Florida's, do not track the federal law. App. 115a.

A. Statutory and Regulatory Background

Congress has required participating states to have a

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[1] See Cone, Health Care Fraud, 40 Am. Crim. L. Rev. 713, 715 (2003) (health care fraud costs taxpayers nearly $100 billion a year).

Medicaid fraud and abuse control unit as an element of a federally-approved Medicaid plan. See 42 U.S.C. § 1396a(61). The function expressly prescribed for such a unit is "the investigation and prosecution of violations of all applicable State laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State plan under this subchapter . . . ." 42 U.S.C. § 1396b(q)(3) (emphasis added).

Under the Florida anti-kickback statute in effect in 2000, it was unlawful to "knowingly solicit, offer, pay or receive any remuneration, including any kickback . . . directly or indirectly . . . in cash or in kind, in return for referring an individual to a person for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program. . . ." § 409.920(2)(e), Fla. Stat. (2000) (emphasis added). The term "knowingly" meant "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." § 409.920(1)(d), Fla. Stat. (2000).

Congress first enacted the Medicaid anti-kickback statute in 1972. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b), 86 Stat. 1329, 1419 (1972). The attendant committee report made clear that these provisions were intended to address practices long considered unethical, that were unlawful in some jurisdictions, and that contributed appreciably to the cost of the Medicare and Medicaid programs. Further, they "would be in addition to and not in lieu of any other penalty provisions in state or federal law." H.R. Rept. No. 92-231, (1972), as reprinted in 1972 U.S.C.C.A.N. 5093, 5094 (emphasis added). Criminal penalties were imposed for "such practices as the soliciting, offering, or accepting of kickbacks or bribes . . . involving providers of health care services." Id. at 5093.

Congress added the "knowingly and willfully" mens rea element in 1980. See Omnibus Reconciliation Act of 1980, Pub.

L. No. 96-499, § 917, 94 Stat. 2599, 2625 (1980). The legislative history indicates that Congress intended to shield from criminal prosecution those individuals "whose conduct, while improper, was inadvertent." H.R. Rep. No. 96-1167, at 59 (1980), as reprinted in 1980 U.S.C.C.A.N. 5526, 5572.

In 1977 Congress included a safe harbor for payments made to employees in a bona fide employment relationship "for employment in the provision of covered items or services." See Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, § 4(b)(1), 91 Stat. 1175, 1180-81 (1977). Once again, Congress noted that kickbacks, long considered unethical and unlawful, contributed significantly to health care costs. H. R. Rep. No. 95-393 (1977), as reprinted in 1977 U.S.C.C.A.N. 3039, 3052.

In 1987 Congress required HHS to issue regulations establishing specific financial arrangements--"safe harbors"--that would not violate the anti-kickback statute. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 4, 14, 101 Stat. 680, 688-89, 697-98 (1987). HHS made clear from the outset that its proposed regulations "would not provide immunity from civil or criminal prosecution or other sanctions under any other Federal or State laws. For example, a particular arrangement under a safe harbor . . . may run afoul of a State law that is applied by the State in a stricter fashion than the federal law." Medicare & Medicaid Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Proposed Rule, 54 Fed. Reg. 3088, 3089 (Jan. 23, 1989).

When promulgating the final safe harbor regulations, 42 C.F.R. § 1001.952, the Office of Inspector General of HHS again stated that "conduct that is lawful under the federal anti-kickback statute or this regulation may still be illegal under State law." Medicare & State Health Care Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991). The employee safe harbor regulation, 42 C.F.R. § 1001.952(i), tracks the statutory safe harbor language

but clarifies that the item or service furnished must be one "for which payment may be made in whole or in part under . . . Medicaid."[2]

Since 1996, HHS has had authority to issue advisory opinions in response to requests for guidance as to whether a specific business arrangement violates the anti-kickback law. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 205, 110 Stat. 1936, 2000-02 (1996) (codified as 42 U.S.C. § 1320a-7d(b)). Advisory Opinion 00-7 recognizes that free transportation services are an integral part of fraudulent Medicaid and Medicare schemes and explicitly characterizes as an "abusive arrangement" van drivers soliciting and offering free transportation to Medicaid patients when the drivers are compensated on a per-patient basis. See Department of Health & Human Servs., OIG Advisory Opinion No. 00-7 (Nov. 17, 2000), available at <http:oig.hhs.gov/fraud/docs/advisory opinions/2000/ao00-7.htm>.

Advisory Opinion 04-09 emphasizes that the statutory and regulatory safe harbors for employee compensation apply to amounts paid to employees for the furnishing of Medicaid-compensable services. "[W]e conclude that the proposed arrangement falls within the plain language of the statutory exception and regulatory safe harbor for employee compensation. The Admissions Adjustment is paid to the Union Employees

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[2]In 1999, HHS promulgated rules to address safe harbors for certain managed care arrangements. It emphasized once more that "compliance with a safe harbor only provides protection from the Federal anti-kickback criminal statute and related administrative sanction authorities. Safe harbors do not apply to other laws, such as State licensure laws, antitrust laws or other Federal and State health care fraud laws. Further, the terms and definitions in these safe harbors do not apply to other laws, including but not limited to antitrust laws." Federal Health Care Programs: Fraud and Abuse; Statutory Exception to the Anti-Kickback Statute for Shared Risk Arrangements, 64 Fed. Reg. 63504, 63506 (Nov. 19, 1999).

pursuant to a collective bargaining agreement as compensation for their employment in the furnishing of services payable by a Federal health care program." See Department of Health & Human Servs., OIG Advisory Opinion No. 04-09 (July 15, 2004), available at <http:oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0409.pdf>.

B. Proceedings Below

In December 2000, the State of Florida, through the Office of the Statewide Prosecutor, filed a nine-count information charging Gabriel Harden and nine other individuals employed by or associated with Dental Express, Inc., or two other related corporate entities with conspiracy, racketeering, and Medicaid fraud under § 409.920(2)(e), Fla. Stat. (2000). App. 98a-114a. The State alleged that the defendants engaged in a "pay for patients" scheme in which van drivers were paid $25 for every Medicaid-eligible child solicited and transported to defendants' dental facility for treatment under the state Medicaid program. The State's trial court memorandum indicated that the van drivers went into economically deprived neighborhoods to solicit eligible children and take them to the clinic. None of the children had a prior appointment. App. 66a.

The defendants did not deny this payment scheme. In fact, they admitted making cash payments in the amount of $25 per head to the van drivers. App. 79a-81a, 94a. In their motion to dismiss the information, defendants asserted these were employer-employee payments protected by the federal safe harbor provision, 42 U.S.C. § 1320a-7b(b)(3)(B). App. 76a-77a. The defendants did not contend then or at any subsequent time that they were providing a service (driving the vans) for which they were compensated by Medicaid. The State asserted that recruiting patients was not a covered service and the van drivers were not bona fide employees. App. 71a, 74a. At a hearing on the motion, the parties agreed the trial court could decide whether the van drivers were bona fide employees, if necessary, after an appeal addressed the constitutionality of the Florida

statute. App. 95a-97a. For purposes of deciding the motion to dismiss the information, however, it is clear the trial court assumed the van drivers were employees within the meaning of the safe harbor provision.

The trial court granted the motion to dismiss, holding that § 409.920(2)(e), Fla. Stat. (2000), was invalid under the Supremacy Clause because of implied conflict preemption. App. 44a. The court believed the payments made to the van drivers for patient referrals were protected under the safe harbor provision. Therefore, it declared that the Florida anti-kickback statute "stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The court did not find that the van drivers were providing a Medicaid-compensable service and concluded only that 42 U.S.C. § 1320-7b(b)(3)(B) bars payments for referrals when the payments are made to third parties who are not bona fide employees. App. 44a.

The trial court also found the Florida statute preempted because its mens rea requirements differed from the federal requirements. App. 52a-53a. While § 409.920(2)(e), Fla. Stat. (2000), requires that a defendant act "knowingly," the federal anti-kickback statute requires that he act "knowingly and willfully." The court decided that Congress had intended to exclude negligent conduct but that the Florida law includes it, thereby frustrating Congress' intent. App. 52a-53a. It did not explain how defendants' admitted payments for patient referrals could have been the result of negligence or inadvertence.[3]

On appeal, the Florida Third District Court of Appeal affirmed. App. 28a-34a. That court held that because states had an obligation under federal law to assist some Medicaid patients

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[3]The trial court also held that § 409.920(2)(e) violated the First Amendment because, in the court's view, it prohibited all solicitation for any purpose. App. 54a-56a. However, neither of the state appellate courts addressed this issue.

with transportation, criminalizing the defendants' conduct stood as an obstacle to the accomplishment of the full purposes and objectives of Congress. App. 32a-33a. Like the trial court, the District Court of Appeal found § 409.920(2)(e) preempted because it allowed prosecution for negligent conduct, thus frustrating Congress' intent.

Agreeing that the issue was one of implied conflict preemption, the Florida Supreme Court affirmed the District Court of Appeal and found the Florida anti-kickback statute preempted for two reasons. App. 1a-25a. First, it held the "should be aware" language of § 409.920(1)(d), Fla. Stat. (2000), would permit prosecution of negligent behavior, whereas the federal standard of "knowingly and willfully" required that a defendant act with knowledge that his conduct was unlawful. App. 16a. The legislative history relative to the 1980 amendment indicated that Congress intended to protect conduct that "while improper, was inadvertent." App. 16a-17a. Second, the statute contained no exceptions or safe harbors and thus ran afoul of Congress' intent to shield "some relatively innocuous commercial arrangements [that] were technically covered by the [federal] statute . . . ." App. 17a-18a.

The court also rejected the State's argument that the defendants' per head referral payments were not sheltered by the safe harbor statute and regulation regardless of whether defendants were bona fide employees. App. 19a-24a. Citing various ambiguous HHS comments, it appeared to accept that an employee payment arrangement did not have to comply with the safe harbor in order to be legal under the anti-kickback statute. App. 20a-22a. Ignoring the fact that, without state approval, defendants had no authority to provide transportation services to Medicaid patients and thus were not providing a covered service for which payment could be made under the Medicaid program, see 42 C.F.R. §§ 441.62 & 431.53; Rule 59G-4.330, Fla. Admin. Code; § 409.905(12) Fla. Stat. (2000), App. 86a-92a, the court concluded that the payment arrangement was for the provision of

a covered service, i.e., transportation, and thus protected from prosecution under the federal statute. App. 23a-24a. While noting the availability of HHS advisory opinions, App. 12a, the court failed to even address Florida's reliance on HHS Advisory Opinions 00-7 and 04-09.

In order to avoid not being able to prosecute kickbacks and other Medicaid-related offenses under § 409.920(2)(e), Florida amended § 409.920(1)(d) in 2004 to add the word "willfully" and define the term "knowingly and willfully." That amendment, however, does not moot this case and other pre-2004 cases like it, or in any way lessen the need for resolution of the preemption and safe harbor issues on a nation-wide basis.

REASONS FOR GRANTING THE WRIT

The states spend billions of their own tax dollars annually on Medicaid in addition to the billions provided by the federal government. This case presents two vitally important questions. The first is whether, contrary to its plain language and HHS regulations, federal law permits patient referral payments to employees for any purpose -- even if the payment is not for a covered service. The second is whether the states, despite the express authorization to prosecute their own laws on fraud, must march in lockstep with the federal government under the federal anti-kickback provision. The answer to both questions must be no.

If the Florida Supreme Court is correct as to the first question, the anti-kickback provision would permit patient referral payments that the federal government itself has declared to be "an integral part of fraudulent or abusive schemes which lead to inappropriate steering of patients, overutilization, and the provision of medically unnecessary services." HHS OIG Adv. Op. 00-7, p. 3. Although federal regulations explicitly provide that transportation is a responsibility of the states, under the lower courts' analysis anyone employed on a commission basis to

solicit Medicaid patients and transport them to a Medicaid provider of any kind qualifies as a provider of a "covered service" regardless of state authorization. This conclusion opens entire new vistas for fraudulent conduct.

If the Florida Supreme Court is correct as to the second question, it would stifle the intent of Congress and HHS that the states be full partners in the fight against Medicaid fraud and would call into question the laws of dozens of states. Both Medicaid providers and the states need to know whether the many varying state anti-kickback laws have been preempted. See App. 115a. State-by-state adjudication will not only be wasteful but will lead to no certain resolution. Only this Court can lay these issues to rest.

A. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S PREEMPTION JURISPRUDENCE AND THE REGULATIONS, ADVISORY OPINIONS, AND STATEMENTS OF THE FEDERAL AGENCY CHARGED WITH ENFORCING THE MEDICAID STATUTE.

1. The Federal Safe Harbor Statute and Regulation Apply Only Where an Employee Provides a Covered Service.

The federal safe harbor statute and the implementing HHS regulation shelter only those payments made to employees in the provision of covered items or services for which payment may be made in whole or in part under Medicaid. See 42 U.S.C. § 1320a-7b(b)(3)(B); 42 C.F.R. § 1001.952(i). The defendants have never claimed they were providing a covered service for which compensation could be made under the Medicaid program, and, in fact, they were not. Based on the plain language of the employee safe harbor provision and HHS' repeated interpretation

of that provision, this should have disposed of their preemption argument. The employee safe harbor is not available to the defendants, and they therefore violated both the federal and state anti-kickback statutes.

The defendants' claim to be transportation providers does not satisfy the requirement of the safe harbor provision that the employee be paid for a Medicaid-compensable service. Under federal law transportation is a responsibility of the states, not Medicaid providers or their employees. See 42 C.F.R. § 441.62 and 42 C.F.R. § 431.53. App. 86a-89a. Florida has a federally-approved Medicaid plan that distinguishes between dental services providers and transportation services providers enrolled in the Medicaid program. See 59G-4.060 & 59G-4.330, Fla. Admin. Code. App. 90a-92a. Moreover, Florida is responsible for paying for transportation only where it is not otherwise available to the Medicaid recipient. See § 409.905(12), Fla. Stat. (2000). Florida's responsibility clearly does not extend to every Medicaid-eligible child solicited and transported by a van driver.

At no time did the defendants contend that any of them was a transportation services provider enrolled in the Medicaid program pursuant to the state regulation. Without that state sanction, they cannot claim to be providing a covered service and they are not entitled to compensation from Medicaid. Indeed, it is precisely this arrangement--a Medicaid provider's utilization of van drivers--that HHS condemned as an abusive practice in Advisory Opinion 00-7. Its logic is obvious. Because the Medicaid provider, be it a physician, a dentist, or other practitioner, invests not only in the patient--here, $25 per head--but also in costly transportation equipment and services for which the practitioner receives no Medicaid compensation, it can be expected that many, to enhance their return, would be tempted to provide unneeded treatment, steer patients to associates at further cost to the state, or submit claims for treatment not provided.

The Florida Supreme Court seemed to think the only important question was whether payments were made to bona

fide employees. It ignored the fact that transportation provided by the defendants' van drivers was not a covered service under the safe harbor provision and made no mention of Advisory Opinion 00-7. App. 23a. The decision strongly suggests defendants' arrangement did not even have to comply with the safe harbor provision in order to be legal, leaving it entirely unclear what kickback payments, if any, may be prosecuted. App. 20a-21a.[4]

Florida is not aware of a single federal case holding that the safe harbor provision protects payments to employees who are not providing a covered service. Relevant authority plainly holds the contrary. See United States v. Starks, 157 F.3d 833, 839 (11th Cir. 1998) (upholding kickback convictions and stating that "even if [defendants] believed they were bona fide employees, they were not providing 'covered items or services'"). Although the lower courts seemed to think that United States ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), holds differently, it does not. In that case a hospital network acquired the medical practices of various physicians and

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[4] In ruling on this question, the Florida Supreme Court seemed to confuse the proposed rule with the final rule. The court asserted that in explaining the final safe harbor rule, "the OIG stated that the employee exception permits 'an employer to pay an employee in whatever manner he or she chose for having that employee assist in the solicitation of program business and applied to bona fide employee-employer relationships.'" App. 19a-20a. The same misstatement appears in the trial court's order. App. 46a. These OIG comments were clearly directed to the proposed rule. See Medicare & State Health Care Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35953 (July 29, 1991). The final rule does not address payments to employees for solicitation of business in whatever manner the employer chooses. The employee must legitimately be furnishing a service for which payment may be made under the Medicaid program. See 42 C.F.R. § 1001.952(i). Throughout these proceedings, the defendants claimed they were providing transportation as a covered service.

signed them to employment contracts. In a qui tam action against the hospital network, the court held the physicians were entitled to compensation under the employee safe harbor because the compensation depended "on the value of the work performed by the individual doctor, not the value of any referrals." Id. at 1050.

Payments for employee-driven patient referrals are simply not sheltered. This conclusion is consistent with the "one purpose rule" adopted by at least four circuits. Under that rule, payment for a patient referral to someone who is not an employee violates the anti-kickback statute even though the payment may arguably compensate for some service. Hence, "a person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals." United States v. McClatchey, 217 F.3d 823, 834-835 (10th Cir. 2000) (citing cases). It strains logic to the breaking point to conclude that Medicaid providers may pay their van drivers for patient referrals--a noncovered service--but others who may provide referrals and a compensable service are subject to prosecution.

HHS has addressed this exact point in Advisory Opinion 04-09. Considering what it assumed to be a bona fide employment relationship involving physicians, HHS stated:

> [W]e conclude that the Proposed Arrangement comes within the language of the statutory exception and regulatory safe harbor for employee compensation, because the compensation will be paid to the Consulting Physicians pursuant to an employment agreement for the furnishing of covered items and services.

Department of Health & Human Servs., OIG Advisory Opinion No. 04-09 (July 15, 2004), available at <http://oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0409.pdf> (emphasis added). The Florida Supreme Court ignored this advisory opinion just as it did HHS Advisory Opinion 00-7.

a. Preemption is Inappropriate No Matter How the Safe Harbor is Construed.

Even assuming, arguendo, that the Florida Supreme Court correctly construed federal law, preemption would be inappropriate. Congress expressly authorized the states to enforce their own laws on fraud. See 42 U.S.C. § 1396b(q)(3). Further, HHS maintained throughout the safe harbor rulemaking proceedings that "[i]ssues of state law are completely independent of the federal anti-kickback statute and [the safe harbor] regulations" and "conduct that is lawful under the federal anti-kickback statute or [the safe harbor] regulation may still be illegal under State law." Medicare & State Health Care Programs: Fraud & Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991). Ordinarily, such agency statements are considered "dispositive" by this Court unless "inconsistent with clearly expressed congressional intent . . . or subsequent developments reveal a change in [the agency's] position." Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 714-715 (1985). Neither is the case here. HHS' statements are plainly consistent with the mandate given the states in 42 U.S.C. § 1396b(q)(3).

Moreover, the court's interpretation tolerates, if it does not invite, fraudulent conduct that will drain state resources. A finding of preemption in these circumstances is contrary to this Court's jurisprudence. A state should be able to protect its own fisc from fraudulent practices where federal law does not in the absence of the clearest statement from Congress. "[B]ecause the states are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly preempt state-law causes of action." Medtronic v. Lohr, 518 U.S. 470, 485 (1996). The states' traditional police powers will not be presumed to have been superseded "unless that was the clear and manifest purpose of Congress." California v. ARC America Corp., 490 U.S. 93, 101 (1989)(citation omitted). See also Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)

(same). Congress' clear and manifest purpose was to allow states to prosecute their own laws on fraud, not to restrict those efforts.

2. The Florida Anti-Kickback Statute Should Not Have Been Held Preempted Because of Different Mens Rea Language.

The decision on the mens rea language is wrong for two reasons. First, the preemptive effect of a federal statute is ascertained through a reviewing court's "reasoned understanding" of the way in which Congress intended the statute and its regulatory scheme to operate. Medtronic, 518 U.S. at 486. Congress, in unambiguous terms, mandated that state Medicaid fraud units were to prosecute violations of state laws, see 42 U.S.C. § 1396b(q)(3), laws bound to differ not only among the states but also with federal law. Indeed, state anti-kickback laws vary greatly, both from each other and the federal statute. App. 115a. In preemption cases, this Court has interpreted explicit statutory provisions recognizing state authority "to mean what they say." Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 34 (1996). HHS was thus correct in stating that conduct lawful under the federal safe harbor law and regulation may be illegal under state law. Moreover, this is, at most, a case where a state, to protect its own resources, imposes liability where the federal government possibly does not. Ordinarily, state laws "are not preempted solely because they impose liability over and above that authorized by federal law." ARC America Corp., 490 U.S. at 105 (citations omitted).

Second, the Florida Supreme Court erred in finding that Florida law stood as an obstacle to the full purposes and objectives of Congress. Florida's anti-kickback law did not forbid what federal law allows. Both criminalize the same intentional act -- making referral payments. In these circumstances, the difference between the federal and Florida mens rea standards is inconsequential; the Florida standard cannot be held to frustrate Congress' purposes.

Congress' use of the word "willfully" was intended to

shield only inadvertent conduct. App. 10a, 17a, 19a. See H. R. Rept. 96-1167, at 59 (1980), reprinted in 1980 U. S. Code Cong. & Admin. News 5526, 5572. It defies logic to conclude that one may inadvertently or negligently pay or accept a fee for a patient referral or, as here, devise a scheme to do so repeatedly. Such conduct is far outside the norms of medical practice. Application of Florida's "should be aware" language to the intentional conduct at issue in this case would not undermine Congress' full purposes and objectives, which include minimizing losses due to fraud from the hundreds of billions of dollars expended every year. Here, Florida has not sought to prosecute negligent conduct, but conduct that every physician should know to be improper.

Finally, even assuming that the "should be aware" language fatally conflicts with the federal anti-kickback statute, the Florida Supreme Court erred in concluding that the Supremacy Clause required the statute to be preempted in its entirety. It is well-established that in preemption cases a court "should not extend its invalidation of a state statute further than necessary to dispose of the case before it." Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)).

If the "should be aware" language from § 409.920(1)(d), Fla. Stat. (2000), were stricken, the word "knowingly" would mean "done by a person who is aware . . . of the nature of his conduct and that his or her conduct is substantially certain to cause the intended result." The Florida Supreme Court did not consider whether it would frustrate Congress' full purposes and objectives for a state to prosecute someone who intended to pay or accept kickbacks for patient referrals and who was "aware of the nature of his conduct" and that it would "cause the intended result." Logically, this language would refer to someone who knew his or her conduct was unlawful, not one who was acting negligently or inadvertently. Perhaps because the Florida Supreme Court found the defendants entitled to the safe harbor

exception, it thought such an analysis unnecessary. Nevertheless, it erroneously held the definition of "knowingly" preempted beyond the extent of actual conflict with the federal statute. See Dalton, 516 U.S. at 476. Because respondents are not entitled to the federal safe harbor exception, this additional analysis should be undertaken. See Brockett, 472 U.S. at 507; Exxon Corp. v. Hunt, 475 U.S. 355, 376 (1986). On this basis the decision below should be vacated and the case remanded for further consideration.

B. THIS CASE PRESENTS IMPORTANT QUESTIONS THAT AFFECT EVERY STATE MEDICAID PROGRAM.

The Florida Supreme Court's decision also calls into question under the Supremacy Clause the Medicaid fraud laws of numerous states. Sixteen states and the District of Columbia have no statutory safe harbor provision like 42 U.S.C. § 1320-7b(b)(3)(B) (2000). Nineteen states do have such a provision. App. 115a. Two states, Missouri and New Mexico, have a mix of laws with and without safe harbors. Undoubtedly, most states would strongly object to Medicaid providers paying kickbacks for patient referrals to employees who provide no Medicaid compensable service. In addition, only three states use the federal mens rea term "knowingly and willfully," nine use only the word "knowingly," and nineteen states and the District of Columbia have no mens rea language at all. Others use such terms as "purposely," "intentionally," "knowingly or intentionally," and "intentionally or with reckless disregard." App. 115a.

Congress gave the states a clear command--to prosecute "violations of all applicable State laws regarding any and all aspects of fraud" in connection with their Medicaid programs. 42

U.S.C. § 1396b(q)(3) (emphasis added). Under their Medicaid fraud laws, Florida and many other states would prosecute those who pay or accept payment for patient referrals. According to the decision below, however, the federal anti-kickback statute affords a safe harbor to such payment schemes, even though they are recognized as intimately associated with fraudulent practices, and preempts more rigorous state laws. Fraud is endemic to the Medicaid program and it is vital that the states know how far their powers extend in this area. Congress has repeatedly characterized patient referral payments as unethical and found they increase the costs of the Medicaid program. See Statement of the Case, supra, pps. 2 & 3. HHS has condemned, not endorsed, the use of van drivers. If prohibiting kickbacks to so-called employees for patient referrals serves to deter fraud, the states should be permitted to do so.

The Florida Supreme Court was equally short-sighted with respect to the mens rea issue. Applying its reasoning, any state anti-kickback statute whose mens rea language is not identical to the federal standard of "knowingly and willfully" would be facially preempted even when--as here--the state is not prosecuting negligent or inadvertent conduct. The Florida Supreme Court did not attempt to explain how the "full purposes and objectives" of Congress under the federal anti-kickback law would be frustrated by slightly differing mens rea standards when a state is not prosecuting negligent or inadvertent conduct. Whether the laws of a majority of states could be found preempted under such reasoning is an important question that should be resolved now.

The Florida Supreme Court's decision, as precedent, is fraught with consequences for the states. State-by-state adjudication of the issues presented can only be wasteful and ultimately inconclusive. The decision is wrong and should be reversed.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court of Florida

No. SC04-613

STATE OF FLORIDA,
Appellant,

vs.

GABRIEL HARDEN, et al.,
Appellees.

[May 18, 2006]
CORRECTED OPINION

QUINCE, J.

We have on appeal a decision of the Third District Court of Appeal declaring invalid section 409.920(2)(e), Florida Statutes (2000), the "antikickback" provision of the Florida Medicaid fraud statute. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we conclude that this provision of Florida's Medicaid fraud statute is in conflict with federal law and therefore preempted by it.

FACTS AND PROCEDURAL HISTORY

In December 2000, the Office of the Statewide Prosecutor filed a nine-count information against ten individuals (Gabriel Harden, Edward Polsky, Maria Rodriguez, Bruce Eric

Smith, Herbert Lee Goss, Flora Johnson, Elsa Cortorreal, Victor Rivera, Billy Madison, and Von Shella Carter) associated with or "employed by" Dental Express Dentists, Dental Express, Inc., and Express Dental, Inc., three corporate entities providing dental services to children (hereinafter Dental Express). The information charged these individuals with conspiracy, racketeering, and Medicaid fraud under section 409.920(2)(e), Florida Statutes (2000). The State alleged that the defendants engaged in a "pay for patients" scheme in which individuals received "per head" payments in exchange for soliciting and driving Medicaid-eligible children for dental treatment at Dental Express.

The defendants filed motions to dismiss the information, arguing that the payment of wages by a Medicaid provider to its employees for the solicitation and transportation of Medicaid-eligible children to dental facilities for treatment was expressly protected by the federal Medicaid statute and the federal administrative regulation "safe harbor" provisions.[1] Thus, the defendants argued, the State's attempt to prosecute this federally protected activity was unconstitutional under the Supremacy Clause in article VI, clause 2 of the United States Constitution. Alternatively, the defendants argued that the undefined term "remuneration" in section 409.920(2)(e) was unconstitutionally vague as applied to employer-employee wages. They also argued that the "solicitation" of patients by employees of a legitimate Medicaid provider, when the solicitation involves no intent to defraud, is protected activity under the First Amendment of the United States Constitution and article I, section 9 of the Florida Constitution. In its response, the State conceded that the patients treated by Dental Express were

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[1] The federal statute specifies certain activities that do not constitute prohibited "illegal remunerations." See 42 U.S.C. § 1320a-7b(b)(3) (2000). Parallel administrative provisions are contained in 42 C.F.R. § 1001.952 (2005).

Medicaid-eligible patients. However, the State asserted that the commission-based method of paying the drivers was unlawful under both federal and state law.

After hearing argument from the parties, the circuit court entered an order granting the defendants' motion to dismiss. The circuit court concluded that the State's attempt to prosecute the defendants under the unlawful remuneration provision of section 409.920(2)(e) was preempted by federal law and thus unconstitutional under the Supremacy Clause. The circuit court also held that the mens rea requirement in section 409.920(1)(d) was preempted by federal law and unconstitutional under the Supremacy Clause. Additionally, the circuit court agreed with the defendants' alternative argument that the State's construction of section 409.920(2)(e) as a criminal ban on the solicitation of commercial business would, absent an intent to defraud requirement not contained in the statute, violate the First Amendment and render the statute unconstitutionally vague as applied.

The State appealed the circuit court's ruling to the Third District. The Third District agreed with the circuit court that there is an implied conflict preemption which renders section 409.920(2)(e) unconstitutional. See State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004). In reaching this conclusion, the Third District noted two significant differences between the federal statute and the Florida statute. First, the federal statute contains "safe harbor" provisions that exclude certain types of payments from being considered "illegal remuneration," including employer-employee payments for the provision of covered items or services such as the transportation of patients for eligible dental services. Based on this distinction, the Third District concluded that Florida's anti-kickback statute criminalizes activity that is protected under the federal statute and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," thereby resulting in

implied conflict preemption. Id. at 355. Second, the federal statute contains a "knowing and willful" mens rea requirement that is not part of the Florida statute. Under federal law, the government must prove that the defendant acted with knowledge that his conduct was unlawful. In contrast, the Florida statute only requires that the defendant act knowingly.[2]

The Florida statutory definition of "knowingly" in section 409.920(1)(d) includes mere negligence and consequently criminalizes activity that the federal statute intended to protect. Id. The Third District found these two differences to be dispositive in this case and did not address the other constitutional defects found by the circuit court. Id. at 355 n.1. Accordingly, the Third District declared the statute unconstitutional.

The State sought review by this Court on the basis of our mandatory jurisdiction to hear appeals of district court decisions declaring a state statute invalid. The Court heard oral argument from the parties and also received several amicus briefs filed in support of the appellees, who were the defendants in the circuit court. The State raises three arguments in its appeal to this Court. The State contends that: neither the federal Medicaid anti-kickback statute nor the federal safe harbor regulations preempts section 409.920(2)(e); the safe harbor regulations do not protect a "per head" payment scheme for the solicitation and

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[2]Section 409.920(1)(d) was amended by the Florida Legislature in 2004 to conform with the federal law on this point. See ch. 2004-344, § 8, at 2392-93, Laws of Fla. This amendment of the mens rea element was in response to the Third District's decision in Harden. See Fla. S. Comm. on Approp. & Fla. S. Comm. Health, Aging & Long-Term Care, CS for CS for SB 1064 (2004), Staff Analysis 10-11 (March 29, 2004) (on file with comm.). As amended, the statute now provides that the term "knowingly" also includes "willfully."

referral of eligible Medicaid patients; and section 409.920(2)(e) does not violate the First Amendment and is not constitutionally vague.

LAW AND ANALYSIS

"We review de novo a district court decision declaring a statute unconstitutional." Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004). This case involves the confluence of federal and state Medicaid law, specifically those provisions referred to as the "anti-kickback" statutes. Both the federal and state statutes prohibit the payment, offer, solicitation, or receipt of a kickback, bribe, or rebate for referring an individual for services paid for under the Medicaid program or for arranging such services. We are asked to determine whether Florida's statute, which encompasses a wide range of remunerations within its ambit of prohibited "kickbacks," is preempted by the federal statute and thus unconstitutional under the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI, cl. 2 (stating that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). In resolving this issue, we begin by reviewing the basic principles of preemption and then we examine the history and language of both the federal and state statutes.

Under the Supremacy Clause, a federal law may expressly or impliedly preempt state law. A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law. See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). The United States Supreme Court has recognized three categories of preemption: (1) express preemption where a federal statute contains "explicit pre-emptive language"; (2) implied field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the

States to supplement it"; and (3) implied conflict preemption, in which "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion) (explaining categories of preemption recognized in Supreme Court case law). The federal anti-kickback statute does not contain explicit preemptive language, nor does it contain such a pervasive scheme of federal regulation so as to indicate field preemption. Thus, this case involves the third category of preemption, i.e., implied conflict preemption.

In any preemption case, the court's "ultimate task . . . is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." Id. (plurality opinion). This involves "looking to the provisions of the whole law, and to its object and policy." Id. (plurality opinion) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)). "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject." Hines v. Davidowitz, 312 U.S. 52, 70 (1941).

In analyzing a claim of preemption, a reviewing court assumes "that the historic police powers of the States [are] not to be superceded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Pharm. Research & Mfrs. of America v. Concannon, 249 F.3d 66, 75 (1st Cir. 2001) (quoting Grant's Dairy–Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 14-15 (1st Cir. 2000)), aff'd 538 U.S. 644 (2003). Federal preemption of a state law is "strong medicine," and is "not casually to be dispensed." Id. (quoting Grant's Dairy, 232 F.3d at 18). This is especially true when the federal statute creates a program, such as Medicaid, that utilizes

"cooperative federalism." "Where coordinated state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." Id. (quoting Wash. Dep't of Soc. & Health Servs. v. Bowen, 815 F.2d 549, 557 (9th Cir. 1987)); see also Pharm. Research & Mfrs. of America v. Walsh, 538 U.S. 644, 666 (2003) ("The presumption against federal pre-emption of a state statute designed to foster public health has special force when it appears . . . that the two governments are pursuing common purposes.") (citation omitted).

Federal Anti-Kickback Statute

The current federal anti-kickback statute, entitled "Criminal penalties for acts involving Federal health care programs," prohibits illegal remunerations. 42 U.S.C. §1320a-7b(b) (2000). The statute provides that

> whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind–
>
> > (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
> >
> > (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

Id. § 1320a-7b(b)(1). The statute also prohibits anyone from "knowingly and willfully offer[ing] or pay[ing] any remuneration" for the same purposes. Id. § 1320a-7b(b)(2). Thus, in order to convict under the federal anti-kickback statute, the government must prove three elements: the defendant (1) knowingly and willfully (2) solicited or received remuneration (3) in return for, or to induce, referral of program-related business. Paragraph (b)(3) of the federal statute lists eight exceptions to which the prohibitions in paragraphs (1) and (2) do not apply. One exception is any payment practice that is specified in the regulations promulgated by the Secretary of the Department of Health and Human Services (HHS). These are the so-called "safe harbors" which are exempt from the anti-kickback prohibitions.

The federal anti-kickback statute was first enacted as part of the Social Security Amendments of 1972, and was primarily concerned with outlawing health care referrals that were considered unethical or inappropriate. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b), 86 Stat. 1329, 1419 (1972). The original statute made it a misdemeanor for any individual to furnish, solicit, offer, or receive any kickback, bribe, or rebate in connection with any item or service for which payment could be made under the Medicare or Medicaid programs. Id. The penalties for violating the statute were fines of up to $10,000 and imprisonment for up to one year. Id. However, several problems arose as to the interpretation of the statute, including the following: there was no mens rea requirement for a violation of the statute; it was unclear what types of business arrangements were precluded by the statute; and the terms "kickback," "bribe," and "rebate" were not defined in the statute. These uncertainties led to conflicting court interpretations of the statute and the test to be applied in determining whether an anti-kickback violation had occurred. Compare United States v. Porter, 591 F.2d 1048 (5th Cir. 1979) (applying a narrow interpretation of the anti-kickback statute)

with United States v. Hancock, 604 F.2d 999 (7th Cir. 1979) (rejecting reasoning in Porter and holding that broad interpretation of statute was appropriate).

Congress amended the statute in 1977 by substituting "any remuneration" for the terms "rebate," "bribe," and "kickback"; by increasing the violation from a misdemeanor to a felony; by increasing the possible fine to $25,000 and the possible length of imprisonment to five years; and by excluding two business practices from the scope of the statute, i.e., the practice of discounts and price reductions and payments made to employees under a bona fide employment relationship. See Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, § 4(b)(1), 91 Stat. 1175, 1180-81 (1977). As explained in the legislative history, the statutory amendments were based on a general agreement "that the existing language of these penalty statutes is unclear and needs clarification." H.R. Rep. No. 95-393(II), at 53 (1977), reprinted in 1977 U.S.C.C.A.N. 3039, 3055. The Office of the Inspector General (OIG) of HHS has explained that the exceptions for certain business practices were prompted by the concerns of "health care providers that many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and are, therefore, subject to criminal prosecution" because "the statute on its face is so broad." Medicare and Medicaid Programs; Fraud and Abuse OIG Anti-Kickback Provisions, 54 Fed. Reg. 3088, 3088 (Jan. 23, 1989) (explaining the statutory background for proposed safe harbor regulations).[3] The legislative history also specifically states that "an amount paid

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[3]This background statement was repeated by the OIG when it issued the final rule implementing the "safe harbor" regulations two years later. See Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,952 (July 29, 1991) (codified at 42 C.F.R. § 1001.952 (2005)).

'by an employer to an employee for employment in the provision of covered items or services' is exempt" from the definition of a kickback. H. R. Conf. Rep. 95-673 (1977), at 41, reprinted in 1977 U.S.C.C.A.N. 3113, 3115. It is this employee payment exception that is at issue here. See 42 U.S.C. § 1320a-7b(b)(3)(B) (2000).

Congress amended the statute again in 1980 by adding a "knowingly and willfully" mens rea element. See Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 917, 94 Stat. 2599, 2625 (1980). As explained by the House Budget Committee, this amendment was prompted by a "concern[] that criminal penalties may be imposed under current law to an individual whose conduct, while improper, was inadvertent." H.R. Rep. 96-1167, at 59 (1980), reprinted in 1980 U.S.C.C.A.N. 5526, 5572. Accordingly, Congress amended the statute "to assure that only persons who knowingly and willfully engage in the proscribed conduct could be subject to criminal sanctions." Id. The anti-kickback statute was amended again in 1987 to establish more statutory exceptions. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 4, 14, 101 Stat. 680, 688-89, 697-98 (1987). These statutory exceptions were designed to assist health care providers in understanding the legal limits of the anti-kickback statute. The Act also required the Secretary of HHS to issue regulations establishing specific financial arrangements that would not violate the anti-kickback statute, referred to as "safe harbors." The proposed regulations took a number of years to be finalized. These safe harbors, which currently number twenty-two,[4] provide

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[4]Some commentators list twenty-three safe harbors. This discrepancy is attributed to differences in how they are divided and not to the substantive content of the regulations. The Code of Federal Regulations divides the safe harbors into twenty-two sections. See 42 C.F.R. §§ 1001.952(a)-(v) (2005); see also Solicitation of New Safe Harbors and Special Fraud Alerts, 70

immunity from prosecution for behavior that might have violated the anti-kickback statute. The employee safe harbor provides that a remuneration "does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer." 42 C.F.R. § 1001.952(i) (2005). This provision also states that the term employee has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2), the Internal Revenue Code definition of an employee.[5] The employee safe harbor presumes a reduced potential for program abuse because of the greater degree of control that employers are presumed to exercise over their employees. See Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,981 (July 29, 1991) ("We are confident that the employer-employee relationship is unlikely to be abusive, in part because the employer is generally fully liable for the actions of its employees and is therefore more motivated to supervise and control them.").

The 1987 amendment also gave the Secretary of HHS authority to exclude a violator from participating in federal

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Fed. Reg. 73,186, 73,187 (Nov. 30, 2005) ("To date, OIG has developed and codified in 42 C.F.R. 1001.952 a total of 22 final safe harbors that describe practices that are sheltered from liability."). HHS is required to develop and publish an annual notice in the Federal Register formally soliciting proposals for modifying the existing safe harbors to the anti-kickback statute and for developing new safe harbors. See 42 U.S.C. § 1320a-7d(a) (2000). Thus, the safe harbors are subject to a continual process of refining and modification.

[5]This provision of the Internal Revenue Code defines an employee as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 U.S.C. §3121(d)(2) (2000).

health care programs and to direct appropriate state agencies to exclude that person or entity from participation in state health care programs as well. See 42 U.S.C. § 1320a-7a(a) (2000). In addition to the criminal penalties, as of August 5, 1997, a violator may also be subject to a civil penalty of up to $50,000 for each act and to an assessment of damages. Id.

As part of the Health Insurance Portability and Accountability Act, in 1996 Congress charged HHS with issuing advisory opinions in response to requests for guidance as to whether a specific business arrangement violates the anti-kickback law. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 205, 110 Stat. 1936, 2000-02 (1996) (codified as 42 U.S.C. § 1320a-7d(b)). These advisory opinions require the requestor to fully identify himself or herself and to involve an actual set of facts or a seriously proposed transaction that will be implemented if the requestor receives a favorable advisory opinion. 42 C.F.R. § 1008.11-.15 (2005). The request may also seek advice on the application of the anti-kickback statute or civil money penalties to a set of facts. Id. § 1008.5(a). Notably, the requestor may not seek an opinion as to whether something is fair market value or whether a person is a bona fide employee. Id. § 1008.5(b); see also 42 U.S.C. § 1320a-7d(b)(3) (2000).

Beginning in 1989, the OIG has issued "Fraud Alerts" to Medicaid providers from time to time.[6] These alerts are intended to inform the health care industry about possibly fraudulent and abusive practices within the industry that constitute statutory

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[6]To date, the OIG has issued twelve individual Special Fraud Alerts. See Solicitation of New Safe Harbors and Special Fraud Alerts, 70 Fed. Reg. 73,186, 73,187 (Dec. 9, 2005); see also HHS Office of Inspector General, Fraud Alerts, Bulletins, and Other Guidance, http://oig.hhs.gov/fraud/fraudalerts.html (last visited May 1, 2006).

violations. See Publication of OIG Special Fraud Alerts, 59 Fed. Reg. 65,372 (Dec. 19, 1994). The fraud alerts also create a stronger case of "intent" if the questionable conduct continues after the alert, encourage whistleblowers to report questionable conduct, and create a cautionary effect on the industry. Patricia Meador, Health Care Fraud and Abuse, 1175 Practicing L. Inst./Corp. 21, 43 (2000).

In response to two requests that OIG "clarify the relationship between the [federal anti-kickback] statute and various State laws," OIG responded that "[i]ssues of state law are completely independent of the federal anti-kickback statute and these regulations." Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,957 (July 29, 1991). The OIG also noted that there is no federal preemption provision under the statute, so conduct that is lawful under the federal statute or regulations may still be unlawful under state law, and vice-versa. The State cites this commentary as evidence that there is no federal preemption of the Florida statute at issue in this case. However, we do not read this commentary as entirely foreclosing the question of preemption. As explained above, the absence of an express preemption provision only means that there is no explicit preemption of the Florida antikickback statute. The statute may still be subject to implicit conflict preemption. As the Supreme Court explained in Gade, conflict preemption can result when it is impossible to comply with both the state and federal regulations or where the state law is an obstacle to accomplishing the full purposes and objectives of Congress. 505 U.S. at 98.

Gade involved Illinois statutes governing the licensing requirements for hazardous waste equipment operators and workers. The Supreme Court concluded that these state regulations were impliedly preempted because they were in conflict with the federal Occupational Safety and Health Act

(OSHA) regulations. The Supreme Court concluded that the "OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation." 505 U.S. at 100 (plurality opinion). The Supreme Court noted that OSHA permits a state to assume responsibility for occupational safety and health standards, but only if it submits a plan that is approved by the Secretary of Labor. Id. at 99 (plurality opinion). In considering the provisions in this section of OSHA as a whole, the Supreme Court concluded that the "implications of the text of the statute evince a congressional intent to preempt nonapproved state regulations when a federal standard is in effect." Id. at 104 n.2 (plurality opinion).

Unfortunately, the federal anti-kickback statute is silent on state anti-kickback laws and state regulatory schemes. Instead, we look to the statutory differences between the federal and state laws to determine whether these differences warrant conflict preemption in light of the preemption principles explained above.

Florida Anti-Kickback Statute and Preemption

Section 409.920(2)(e), Florida Statutes (2000), which is included in the statute entitled "Medicaid provider fraud," makes it unlawful to:

> Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any

> goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program.

A person who violates this subsection commits a felony of the third degree, which is punishable by imprisonment of up to five years and a fine of $5,000. § 409.920(2), Fla. Stat. (2000) ("A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."). The statute was created in 1991. See ch. 91-282, § 50, Laws of Fla. The statute provided definitions related to Medicaid provider fraud, established penalties for certain types of fraud, and set the statute of limitations for prosecution under the statute. See Fla. H.R. Comm. on Health Care, CS for CS for SB 1000 (1991) Staff Analysis 21 (May 21, 1991) (on file at Fla. Archives). There were no pertinent substantive changes to the statute until 2004, when the Legislature changed the definition of "knowingly" to require a higher scienter level. See ch. 2004-344, § 8, Laws of Fla. However, that higher scienter is not applicable to the instant case, which was prosecuted under the 2000 statute.

The 2000 Florida anti-kickback statute differs from the federal statute in two important respects. First, the Florida statute has a lower mens rea element which permits an anti-kickback violation based on negligent behavior. The Florida statute defines "knowingly" as "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." § 490.920(1)(d), Fla. Stat. (2000) (emphasis added).[7] In

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[7]The definition of "knowingly" was amended by the Legislature in 2004 to include the word "willfully." See ch. 2004-344, § 8, at 2392-93, Laws of Fla. As amended, the statute now provides:

contrast, the federal statute applies only to those acts that are performed "knowingly and willfully," which requires proof that "the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." United States v. Starks, 157 F.3d 833, 838 (11th Cir. 1998) (quoting Bryan v. United States, 524 U.S. 184, 193 (1998), in which a federal firearms trafficking law prohibited anyone from "willfully" violating the statutory provision that forbids dealing in firearms without a federal license).[8] These mens rea elements,

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> "Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident. As used in this section, the term "knowingly" also includes the word "willfully" or "willful" which, as used in this section, means that an act was committed with bad purpose, either to disobey or disregard the law.

§ 409.920(1)(d), Fla. Stat. (2005).

[8]Prior to the Supreme Court's decision in Bryan, only the Ninth Circuit Court of Appeals had applied a heightened mens rea standard to the federal anti-kickback statute. See Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995) (construing "knowingly and willfully" as requiring defendants to know that the statute prohibits offering or paying remuneration to induce referrals and to engage in the prohibited conduct with the specific intent to disobey the law). Other circuits have interpreted "willfully" under a middle mens rea standard, which is consistent with the Supreme Court's subsequent decision in Bryan. See United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998) (approving jury instruction which informed jury that knowingly "means that the act was done voluntarily and intentionally, not because of mistake or accident"); United States v. Jain, 93 F.3d 436, 441 (8th Cir.

which were added to the federal Medicaid anti-kickback statute in 1980, reflect Congressional concern "that criminal penalties may be imposed under current law to an individual whose conduct, while improper, was inadvertent." H.R. Rep. No. 96-1167, at 59 (1980), reprinted in 1980 U.S.C.C.A.N. 5526, 5572; see also United States v. Jain, 93 F.3d 436, 440 (8th Cir. 1996) (noting that "the literal language of this statute might otherwise encompass some types of innocent conduct").

Second, the Florida anti-kickback statute contains no exceptions or safe harbors. Congress was concerned that the federal anti-kickback statute was so broad that "some relatively innocuous commercial arrangements were technically covered

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1996) (concluding that heightened mens rea standard of Medicare anti-kickback statute only required proof that defendant knew that his conduct was wrongful and not that he knew it violated "a known legal duty"); United States v. Neufeld, 908 F. Supp. 491, 496-97 (S.D. Ohio 1995) (declining to follow the Hanlester interpretation of "willfulness" as requiring knowledge of illegality). Commentators have predicted that the standard announced in Bryan will be followed by federal courts in anti-kickback prosecutions. See Robb DeGraw, Note, Defining "Willful" Remuneration: How Bryan v. United States Affects the Scienter Requirement of the Medicare/Medicaid Anti-kickback Statute, 14 J.L. & Health 271 (1999-2000). However, even after the decision in Bryan, the Tenth Circuit still applied the higher mens rea standard to an anti-kickback prosecution. See United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000) (requiring proof of specific intent to violate the law). Thus, there is still some question as to the scienter requirement for a violation of the federal anti-kickback statute. In no cases, however, have the federal courts applied a negligence or inadvertence standard similar to that in Florida's statute.

by the statute and therefore were subject to criminal prosecution." Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions & Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute, 64 Fed. Reg. 63,518, 63,518 (Nov. 19, 1999).

Our research has only revealed one other case which addresses the question of preemption of a state anti-kickback statute.[9] In Massachusetts v. Mylan Labs., 357 F. Supp. 2d 314 (D. Mass. 2005), the defendants argued that the anti-kickback provision in Massachusetts law was preempted by federal law. The defendants argued that "the lack of a scienter requirement means that certain behavior legal under the federal statute would be illegal under the Massachusetts statute, leading to inevitable conflict." Id. at 325. The Mylan Laboratories defendants cited the Third District's decision in Harden in support of their preemption argument. However, because the argument was raised late in the briefing and because the court found that "the interpretation of the law [on the scienter requirement] is evolving," it deferred ruling on the preemption issue. Id.; see also Boman v. S.E. Med. Services Group, No. 9501957, 1998 WL 1182063, at *10 (Mass. Super. Ct. Jan. 7, 1998) ("The primary difference between the federal anti-kickback statute and

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[9]This lack of cases might be attributable to the fact that some state anti-kickback statutes were drafted to closely follow the federal statute. See, e.g., People v. Palma, 48 Cal. Rptr. 2d 334, 338 (Cal. Ct. App. 1995) (explaining that California legislature "was adopting the federal statutes" when it enacted the state anti-kickback statute; thus court looked to federal law for definition of "employee"); see also Colo. Rev. Stat. Ann. § 26-4-1103(2) (2002) (providing a number of exceptions to anti-kickback statute, including any remunerations permitted pursuant to "any safe harbor regulations of the federal department of health and human services").

the state provisions is that the Massachusetts statutes do not require the action or practice to be knowing and willful.").

Based on the differences between the federal and state statute at issue here, we conclude that Florida's anti-kickback statute criminalizes conduct that federal law specifically intended to be lawful and shielded from prosecution. See legislative history of federal statute discussed supra pp. 10-12 and differences in Florida statute discussed supra pp. 18-20. There is clear congressional intent to exempt compensation paid by employers to bona fide employees for providing covered items or services from those remunerations that constitute prohibited kickbacks under the federal statute. The heightened mens rea of the federal statute also indicates a clear intent that negligent or inadvertent behavior not subject an individual to prosecution under the federal statute.

Both the heightened mens rea requirement and the safe harbor provisions are key elements in fulfilling the purpose of the federal anti-kickback statute, which is to outlaw health care referrals that are unethical. Accordingly, we agree with the Third District that the Florida anti-kickback statute is preempted because it presents an obstacle to the accomplishments of the purposes of the federal law.

Employee Safe Harbor

The State also argues that the employee safe harbor exception to the federal Medicaid anti-kickback statute does not permit the type of "per head" referral payments made here, even if the payments are made to a bona fide employee. The employee exception provides that the prohibition on illegal remunerations is not applicable to "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services." 42 U.S.C. § 1320a-7b(b)(3)(B) (2000). The

safe harbor regulation further explains that "the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2)." 42 C.F.R. § 1001.952(i) (2005). In explaining the final rule which implemented the safe harbors, the OIG stated that the employee exception permits "an employer to pay an employee in whatever manner he or she chose for having that employee assist in the solicitation of program business and applied to bona fide employee-employer relationships." Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,953 (July 29, 1991); see also Medicare and Medicaid Programs; Fraud and Abuse OIG Anti-kickback Provisions, 54 Fed. Reg.3088, 3093 (Jan. 23, 1989) ("We believe that if individuals and entities desire to pay a salesperson on the basis of the amount of business they generate, then to be exempt from civil or criminal prosecution, they should make these salespersons employees where they can and should exert appropriate supervision for the individual's acts."). In its provision-by-provision analysis of the safe harbors, the OIG explained that Congress expressly limited the employee exception to bona fide employment relationships, which do not include independent contractors; that the IRS definition of employee which establishes the criteria for a bona fide employment relationship under the safe harbor also includes the IRS's interpretation of 26 U.S.C. § 3121(d)(2) as codified in its regulations and other interpretive sources; that a part-time employee who is paid on a commission-only basis can fall within the scope of the employee provision as long as a bona fide employer-employee relationship exists; and that other types of personal service arrangements, while not covered by the employee provision, may be protected under the personal services and management contracts safe harbor provision. 56 Fed. Reg. at 35,981.

Individuals or entities will be exempt from prosecution under the federal anti-kickback laws if the activities in which they engage satisfy the requirements of the safe harbor

provisions. See Lissa Bourjolly & Erin Moak, Health Care Fraud, 41 Am. Crim. L. Rev. 751, 767 (2004). In order to fit within a safe harbor, each element of the particular safe harbor must be met. See David W. Ball, Medicare Fraud and Abuse Anti-Kickback Safe Harbor Regulations, 3 S.C. Law. 34, 35 (1991). However, failure to comply with the applicable safe harbors is not a per se violation of the anti-kickback statute. In the preamble to the 1999 safe harbor regulations, OIG states that an arrangement does not have to comply with a safe harbor in order to be legal under the anti-kickback statute. Medicare and State Health Care Programs: Fraud and Abuse, 64 Fed. Reg. 63,518, 63,521 (Nov. 19, 1999). Moreover, in response to several comments, the OIG emphasized that an arrangement is not necessarily suspect because it does not comply with a safe harbor, although it may be suspect under particular circumstances. However, due to substantial uncertainty in the safe harbors, each transaction is likely to be evaluated on a case-by-case basis to determine whether it constitutes an anti-kickback violation. Bourjolly & Moak, 41 Am. Crim. L. Rev. at 766-67. The burden of proof lies with the entity or individual claiming a safe harbor as a defense. Health Care Programs: Fraud and Abuse, 57 Fed. Reg. 3298, 3353 (Jan. 29, 1992) ("The respondent bears the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances.").

While there are no HHS advisory opinions that address the exact situation presented in the instant case, the OIG has made a number of enlightening statements in the preambles to the safe harbor regulations. In response to comments requesting that the OIG protect marketing and advertising activities because such activities promote competition or do not violate the statute, the OIG noted that many marketing and advertising activities may involve at least technical violations of the anti-kickback statute. Medicare and State Health Care Programs, 56 Fed. Reg. at 35,974. However, the OIG has also stated that many of these

marketing and advertising activities should not be subject to prosecution because they are passive in nature and do not involve direct contact with program beneficiaries, or because the individual or entity involved in these promotions is not involved in the delivery of health care. Id.

There is no case law directly on point with the pay arrangement here. However, there are several cases involving payments for referrals. In one case, a federal district court upheld commission-based payments to physicians who referred Medicaid patients to the hospital that employed the physicians. See United States ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045 (N.D. Ill. 2002). In another case, a Texas appellate court concluded that a contract between a hospital and a recruiter was not a violation of the federal anti-kickback statute because the recruiter was an employee under the safe harbor provision. See New Boston Gen. Hosp., Inc. v. Texas Workforce Comm'n, 47 S.W.3d 34 (Tx. App. 2001). In contrast, the Eleventh Circuit upheld anti-kickback convictions for per-patient payments made to two employees of the Florida Department of Health and Rehabilitative Services (HRS) for referring patients to a drug treatment program funded by Medicaid. See United States v. Starks, 157 F.3d 833 (11th Cir. 1998). The Eleventh Circuit concluded that the HRS employees did not fit within the employee safe harbor because they were not providing "covered items or services" as required by the statute, but were simply paid for referrals to the program; and they did not receive regular salary checks from the drug treatment program at their place of employment, but clandestinely received checks with false category codes or cash in parking lots and other locations to avoid detection by their coworkers. Id. at 839. The Seventh Circuit also found an anti-kickback violation for cash payments given to an independent cardiac pacemaker sales representative for each Medicare patient that he referred to a medical facility where he was not an employee. See United States v. Polin, 194 F.3d 863 (7th Cir. 1999). The medical facility defendants argued

that they had not violated the statute because the pacemaker sales representative recommended the facility to the patients but only a doctor could actually refer the patients to the facility. The Seventh Circuit did not agree with this argument and characterized the arrangement as a "classic case of an illegal kickback" prohibited by the federal statute. Id. at 867.

We note a glaring distinction between the arrangements upheld in Obert-Hong and New Boston and those deemed prohibited in Starks and Polin. The payments deemed legal involved payments to bona fide employees. See Obert - Hong, 211 F. Supp. 2d at 1050 (explaining that the doctors signed employment contracts requiring them to refer patients to the hospital and that the anti-kickback statute was not designed to regulate hospital- physician employment relationships); New Boston, 47 S.W.3d at 36 (explaining that the Texas Workforce Commission found that the individual in question was an employee and not an independent contractor, based on a continuing relationship, training, and methods of compensation which included fringe benefits). In contrast, the payments found in violation of the federal anti-kickback statute involved payments to nonemployees. See Starks, 157 F.3d at 835-36 (describing payment recipients as community health aides in the employ of Florida HRS who were prohibited from accepting any outside employment that might pose a conflict of interest with their work at HRS and obligated to report any outside employment to HRS); Polin, 194 F.3d at 864 (describing person offered cash payments for referring patients to cardiac pacemaker monitoring service as a pacemaker sales representative).

Based on this limited precedent regarding the applicability of the employee safe harbor to various payment arrangements and the stated intent for this safe harbor, we agree with the circuit court and the Third District that the particular pay arrangement at issue here involves protected

employer-employee payments for the provision of covered items or services, which are protected from criminal prosecution under the federal statute.

Constitutional Defects

The circuit court also ruled that the Florida statute violates Dental Express's First Amendment right to solicit patients and provide transportation to those patients and is unconstitutionally vague. State v. Harden, No. F00-38785, at 17-20 (Fla. 11th Cir. Ct. Feb. 5, 2003) (order granting defendants' motion to dismiss). On appeal, the Third District found the preemption issue to be dispositive and did not address these constitutional defects. State v. Harden, 873 So. 2d 352, 355 n.1 (Fla. 3d DCA 2004). Because we conclude that the statute is preempted by the federal law, we do not reach these constitutional issues.

CONCLUSION

For the reasons stated above, we agree with the Third District that section 409.920(2)(e), Florida Statutes (2000), is preempted by federal law and thus unconstitutional under the Supremacy Clause. Accordingly, we affirm the decision of the Third District in Harden.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, and BELL, JJ., concur.
LEWIS, J., concurs in result only.
CANTERO, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity

Third District - Case No. 3D03-521

(Dade County)

Charles J. Crist, Jr., Attorney General, Christopher M. Kise, Solicitor General, Louis F. Hubener, Chief Deputy Solicitor General, Lynn C. Hearn, Deputy Solicitor General, and Jason Vail, Assistant Attorney General, Tallahassee, Florida,

for Appellant

G. Richard Strafer, P.A., Miami, Florida, Anthony C. Vitale, P.A., Miami, Florida, Ronald J. Manto of Manto and Kassebaum, LLP, Coconut Grove, Florida, and Charles Wender, Boca Raton, Florida,

for Appellees

M. Stephen Turner, P.A., Kelly A. O'Keefe and Brooke E. Lewis of Broad and Cassel, Tallahassee, Florida, and Gabriel L. Imperato, P.A., of Broad and Cassel, Fort Lauderdale, Florida, on behalf of DaVita, Inc., Fresenius Medical Care Holdings, Inc., and Gambro Healthcare, Inc.; Brit L. Geiger, New York, New York, Gadi Weinreich, and Howard J. Young, Washington, D.C., on behalf of Sonnenschein Nath and Rosenthal, LLP; and Max R. Price and Colleen M. Greene, Miami, Florida, on behalf of Joel M. Berger, D.D.S.,

As Amici Curiae

APPENDIX B

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 6, 2006

CASE NO.: SC04-613
Lower Tribunal No.: 3D03-521

STATE OF FLORIDA vs. GABRIEL HARDEN, ET AL.

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and Clarification is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE and BELL, JJ., concur.
CANTERO, J., recused.

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

mc
Served:

CHARLES M. FAHLBUSCH
CHRISTOPHER MICHAEL KISE
STEVEN BUSTAMANTE
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AUBREY G. RUDD
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MARK L. SHUMAKER
RONALD JOSEPH MANTO
GADI WEINREICH
HON. HARVEY RUVIN, CLERK
HON. DAVID C. MILLER, JUDGE
HON. MARY CAY BLANKS, CLERK
HOWARD J. YOUNG
M. STEPHEN TURNER
TONY MOSS
MICHAEL R. BAND
CHARLES WENDER
GABRIEL L. IMPERATO
KELLY ANN O'KEEFE
BRIT L. GEIGER
BROOKE E. LEWIS

APPENDIX C

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, 2004

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 3D03-521
GABRIEL HARDEN, et al.,	**	LOWER TRIBUNAL NO.
	**	00-38785(A-J)
Appellees.	**	

Opinion filed March 10, 2004.

An Appeal from the Circuit Court for Miami-Dade County, David Miller, Judge.

Charles J. Crist, Jr., Attorney General, and Jason Vail and Charles M. Fahlbusch, Assistant Attorneys General, and Christopher M. Kise, Solicitor General, for appellant.

Anthony C. Vitale; G. Richard Strafer; Mark L. Shumaker; Manto & Kassebaum and Ronald J. Manto; Tony Moss; and Bennett H. Brummer, Public Defender, and Carlos Gonzalez, Assistant Public Defender, for appellees.

Sonnenshein Nath & Rosenthal (Washington, D.C.), Bruce Merlin Fried, Gadi Weinreich, Howard J. Young, Lisa A. Estrada and Jane Hyatt Thorpe, as amicus curiae.

Before COPE, GODERICH and SHEVIN, JJ.

CORRECTED OPINION

GODERICH, Judge.

The State appeals from an order granting the defendants' motion to dismiss the information and declaring Florida's Medicaid Provider Fraud Statute, § 409.920(2)(e), Fla. Stat. (2000), unconstitutional. We affirm.

On December 22, 2000, the State filed a nine-count information charging Gabriel Harden and nine other defendants with racketeering, conspiracy to commit racketeering, and Medicaid fraud. Specifically, in Counts 3-9, the State alleged that the defendants violated the "anti-kickback" provision of Florida's Medicaid Provider Fraud Statute, § 409.920(2)(e), Fla. Stat. (2000), by paying drivers, who were alleged to be "employed by or associated with" three corporate entities that were engaged in the business of providing dental services to children, a per head fee or commission for the "solicitation and transportation" of Medicaid eligible children to "dental facilities for treatment." Counts 1 and 2 charged the defendants with racketeering and conspiracy to commit racketeering, and were based on the same allegations as Counts 3-9.

On October 4, 2002, Harden filed a motion to dismiss the information arguing, among other things, that payment of wages by a Medicaid provider to its employees for the "solicitation and transportation" of Medicaid-eligible children "to dental facilities for treatment" was expressly protected by federal Medicaid statutes and regulations, the so-called "safe harbors," and that the State's attempt to criminally prosecute this federally protected activity was unconstitutional under the Supremacy Clause. U.S. CONST. art.VI, cl. 2. Thereafter, the other defendants adopted Harden's motion.

On December 12, 2002, the State filed its response arguing that the method of payment used by the providers to pay the drivers was unlawful. The State alleged that the provider would pay the driver $25 to $30 cash for each Medicaid-eligible child the driver could find and bring to the clinic. The State argued that this recruiting or solicitation of patients by Medicaid providers through its paid employees was unlawful under both federal and state law and amounted to kickbacks for patient referrals. On January 10 and 31, 2003, the trial court heard arguments of counsel, and on February 18, 2003, the trial court granted Harden's motion to dismiss stating, in part:

> [T]he State's attempt herein to prosecute, as a category of unlawful "remuneration" barred by Section 409.920(2)[(e)], the wages paid by Harden's business, Dental Express, Inc., (i.e., an employer) to certain of its employees for the purposes of soliciting and transporting Medicaid-eligible patients to Harden's dental facilities is preempted by both an express provision of the federal Medicaid Act, 42 U.S.C. § 1320a-7b(b)(3), as well as a parallel administrative "safe harbor" provision, 42 C.F.R. § 1001.952(i).

Thus, the trial court applied implied conflict preemption analysis and found that section 409.920(2)(e), Florida Statutes (2000), was unconstitutional. Additionally, the trial court found that the mens rea requirement in section 409.920(1)(d), Florida Statutes (2000), as applied to section 409.920(2)(e), Florida Statutes (2000), was preempted by federal law and also unconstitutional. The trial court subsequently entered dismissal orders as to the other defendants. The State's appeal follows.

The State contends that the trial court erred by declaring section 409.920(2)(e), Florida Statutes (2000), unconstitutional

and by dismissing the defendants' informations. Specifically, the State argues that Florida's anti-kickback statute does not conflict with the federal anti-kickback statute and that therefore the Florida statute is not preempted under the Supremacy Clause. We disagree.

Implied conflict preemption occurs when (a) compliance with both federal and state regulations is a physical impossibility, or (b) when a state law is an obstacle to execution and accomplishment of the objectives and purpose of a Congressional enactment. Pharmaceutical Research & Mfrs. of Am. v. Meadows, 304 F.3d 1197, 1206 (11th Cir. 2002).

The federal anti-kickback statute, 42 U.S.C. 1320a-7b (2000), titled "Criminal penalties for acts involving Federal health care programs," provides, in pertinent part:

(b) Illegal remunerations

* * *

(2) whoever knowingly and willfully offers to pay any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person --

> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, . . .
>
> * * *

shall be guilty of a felony . . . .

* * *

(3) Paragraphs (1) and (2) shall not apply to –

* * *

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services . . . .

At first glance, section 409.920(2)(e), Florida Statutes (2000), appears to track the language of the federal statute by making it unlawful to:

> (e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging of the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing leasing or ordering any goods, facility, item or service, for which payment may be made, in whole or in part, under the Medicaid program.

However, upon closer examination, there are two significant differences between the federal anti-kickback statute and the Florida anti-kickback statute. First, the federal statute contains several so-called "safe harbor" provisions that exclude certain types of payments from being considered "illegal remuneration." 42 U.S.C. § 1320a-7b(b)(3)(2000). Specifically, 42 U.S.C. § 1320a-7b(b)(3)(B)(2000) protects employer-employee payments for the provision of covered items or services from criminal

prosecution. The federal medicaid statutes require participating states to provide transportation to those eligible for dental services. 42 U.S.C. § 1396a(a)(43)(2000); § 409.905(12), Fla. Stat. (2000). Therefore, the Florida anti-kickback statute without any "safe harbor" provisions criminalizes certain activity that is protected under the federal anti-kickback statute and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Meadows, 304 F.3d at 1206.

Secondly, the federal anti-kickback statute contains a "knowing and willful" mens rea requirement. Under federal law, "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" Bryan v. United States, 524 U.S. 184, 192 (1998)(citations omitted). In contrast, Florida's anti-kickback statute only requires that the defendant act "knowingly." In turn, "knowingly" is defined as "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." § 409.920(1)(d), Fla. Stat. (2000). This Florida definition of "knowingly" would include "mere negligence," thereby criminalizing activity that the federal statute intended to protect. Hanlester Network v. Shalala, 51 F.3d 1390, 1399 n.16 (9th Cir. 1995)("The legislative history demonstrates that Congress, by use of the phrase 'knowingly and willfully' to describe the type of conduct prohibited under the anti-kickback laws, intended to shield from prosecution only those whose conduct 'while improper, was inadvertent.'"). Again, enforcement of the Florida anti-kickback statute would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Meadows, 304 F.3d at 1206.

For these reasons, we conclude that the trial court properly found that there was implied conflict preemption and declared section 409.920(2)(e), Florida Statutes (2000),

unconstitutional.[10]

Accordingly, we affirm.

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[10]In its order of dismissal, the trial court found other constitutional defects. Because the issues discussed above are dispositive, we do not consider the property of those rulings.

APPENDIX D

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR
MIAMI-DADE COUNTY
FLORIDA

CASE NO. F00-38785

Judge Miller

STATE OF FLORIDA,

Plaintiff,

v.

GABRIEL HARDEN, et al.,

Defendants.

_____/

ORDER GRANTING DEFENDANT HARDEN'S MOTION TO DISMISS THE INFORMATION

THIS CAUSE came before the Court on Defendant Harden's Motion To Dismiss the Information Because F.S. § 409.920 is Unconstitutional and Incorporated Memorandum of Law. In that motion, which all of the remaining defendants have adopted, Harden has argued that the Information, charging him with violating the "anti-kickback" provision of Florida's Medicaid fraud statute, *Fla. Stat. § 409.920(2)(e)*, is unconstitutional for several inter-related reasons. The State has filed a response to the motion and, on January 10, 2003, the Court entertained lengthy oral argument by the parties. The

Court, having considered the motion, the State's response and the arguments presented, as well as its own research, hereby ORDERS AND ADJUDGES that said motion is GRANTED.

For the reasons set forth below, the Court finds that the State's attempt herein to prosecute, as a category of unlawful "remuneration" barred by Section 409.920(2), the wages paid by Harden's business, Dental Express, Inc. (*i.e.*, an employer) to certain of its employees for the purposes of soliciting business and transporting Medicaid-eligible patients to Harden's dental facilities is preempted by both an express provision of the federal Medicaid Act, *42 U.S.C. § 1320a-7b(b)(3),* as well as a parallel administrative "safe-harbor" provision, *42 C.F.R. § 1001.952(i).* Accordingly, the Court holds that Section 409.920(2) is unconstitutional as applied by the State in this case under the "Supremacy Clause," Article VI, Clause 2, of the United States Constitution. In addition, the Court further holds that a second aspect of Florida's Medicaid fraud statute, the *mens rea* requirement in *Fla. Stat. § 409.920(1)(d),* is preempted by federal law and is unconstitutional on its face under the Supremacy Clause. *See* Section I below.

The Court also finds that the State's attempted application of Section 409.920(2) is unconstitutional for reasons separate and apart from a Supremacy Clause analysis. Under the State's construction of *Fla. Stat. § 409.920(2)(c),* it would be a felony in the State of Florida for an employer to pay an employee to "solicit" legitimate Medicaid business even when the solicitation was conduct without an "intent to defraud" the Medicaid program. Such a construction of *Fla. Stat. § 409.920(2)(c),* however, renders it unconstitutional under the First Amendment to the United States Constitution, as construed by the Supreme Court of Florida in *State v. Cronin*, 801 So.2d 94 (Fla. 2001), and *State v. Bradford*, 787 So.2d 811 (Fla. 2001). *See* Section II below. Alternatively, the undefined term "unlawful remuneration" in *Fla. Stat. § 409.920(2)(c)* is unconstitutionally

vague under the due process clauses of the federal and state constitutions. *See* Section III below.

I. PREEMPTION

A. General Principles

Federal law may pre-empt or bar the application of state law under three distinct ways – "express preemption," "field preemption" and "implied conflict preemption." *See generally Gade v. National Solid Wastes Mgmt.*, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed. 73 (1992). Harden has based his motion to dismiss solely on the third category, "implied conflict preemption."

The test for determining when "implied conflict preemption" occurs is well established and not disputed by the State. Federal law bars the application of a state law when compliance with the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98 (quotations and citations omitted). *Accord O'Loughlin v. Pinchback*, 579 So.2d 788, 791-92 (Fla. 1991) (citations omitted). In order make this determination, the Court must examine the state law "under the circumstances of th[e] particular case" to see whether it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that 'obstacle' goes by the name of conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference, or the like." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (internal quotations omitted.) The United States Supreme Court also teaches that courts must not only examine the bare statutory language of the federal and state laws but also consider the structure and purpose of the entire federal statutory scheme. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288, 2294, 147 L.Ed.2d 352 (2000).

The structure and purpose of the federal Medicaid program require that courts carefully scrutinize state laws that effectively limit the rights guaranteed under federal law. Through the "Medicaid Act," Title XIX of the Social Security Amendments of 1965, Pub.L. No. 89-97, Stat. 286 (1965), codified at *42 U.S.C. § 1396, et. seq.* (2002), Congress established a program that supplies federal funds to states, and ultimately for the benefit of the poor, elderly and disabled, so long as the states agree to maintain medical programs or plans consistent with *federal* statutory and regulatory requirements. Participation in the Medicaid program is voluntary for the states. However, when a state, such as Florida, agrees to accept federal benefits, it must implement and operate a program that complies with detailed federally mandated standards. *See The Public Health Trust of Dade Co. v. Jackson Memorial Hospital*, 693 So.2d 562, 564 (Fla. 3d DCA 1996) ("once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations") (citations omitted). Thus, "federal standard[s] remain the directly applicable standards with which the States must comply in order to receive federal Medicaid funding." *Antrican v. Odom*, 290 F.3d 178, 187 (4th Cir. 2002).

It is not surprising, then, that numerous state and federal courts have held, in a variety of contexts, that the federal Medicaid statute preempts state statutes whose enforcement would impinge on the rights and benefits intended to be conveyed by federal law.[11]

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[11] *See e.g., Jackson Memorial Hospital*, 693 So.2d at 566 (invalidating on Supremacy Clause grounds a provision of the Florida Administrative Code that allowed hospitals to hold third parties liable for patient services in excess of amount permitted by federal Medicaid regulation); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 478, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (remanding for the entry of an injunction against the enforcement of state law relating to

B. The Theory of Prosecution

To see whether state law is preempted here, the Court begins by examining the "the circumstances of th[e] particular case," *i.e.*, the particular alleged basis for the charges in the Information. The Information in this case charges the defendants with nine counts. Counts 3-9 allege that the defendants made certain payments that constituted "unlawful remuneration" or kickbacks in violation of Section *409.920(2)(e)*. Each of these counts contains the identical language defining the "payments" in question:

> [The defendants] ... did pay ... a per head fee [to the drivers] based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental

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abortion services to the extent that it conflicted with the Medicaid Act); *Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998) (state law tortious interference a claim preempted by Medicare Act review process); *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996) (holding that a provision of Michigan law was invalid under the Supremacy Clause because it conflicted with the Medicaid Act); *Bodimetric Health Services v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990) (state law fraud claim preempted by Medicare Act review process); *Smith v. Travelers Indemnity Co.*, 763 F. Supp. 554, 558 (M.D. Fla. 1989) (because Florida's "collateral source rule permits private automobile liability insurers to become secondary sources of recovery behind Medicare, Florida's collateral source rule obstructs the Congressional purpose" behind the Medicare Act and, therefore, is preempted) (citation omitted); *Martin v. State*, 642 N.W.2d 1, 34-36 (Minn. 2002) (Minnesota law allowing the state to assert a subrogation right to personal injury awards preempted by anit-lien provisions of federal Medicaid Act because "the federal law prohibits exactly what the state law allows").

> facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program....

In other words, according to the State's theory of prosecution, Section *409.920* prohibits, within its definition of "unlawful remuneration," a Medicaid provider (Dental Express) from paying wages, at least in the form of commissions (the "per head fees") to its employees (the drivers) for the purposes of soliciting, directly or indirectly, potential Medicaid-eligible patients and transporting those patients to the facilities for treatment.

The remaining two counts, Counts 1 and 2, also incorporate this theory of prosecution. Counts 1 and 2 charge the defendants with racketeering and conspiracy to commit racketeering, in alleged violation of *Fla. Stat. §§ 895.03(3)* and *(4)*. Both counts, however, incorporate as the predicate criminal "incidents" the employer-employee payments charged as "kickbacks" in Counts 3-9. Accordingly, if the State's theory of prosecution is defective, all nine counts of the Information must be dismissed.[12]

Harden contends that the State's attempt to criminalize employer-employee payments as unlawful kickbacks is

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[12] Count 2 contains additional factual allegations suggesting that the drivers made other "possibly unlawful remunerations" – in the form of small "gifts of food and/or money" – directly to the patients or their families. During the oral argument on the motion to dismiss, the State indicated that it had evidence suggesting that the defendants were at least aware of these payments. However, since the kickbacks ***actually charged in the Information*** were the employer-to-employee/driver payments and not the alleged employee/driver -to-patient payments, these extraneous allegations to not affect the Court's analysis.

preempted by the federal Medicaid scheme that preempts state law. Under the circumstances of this case, the Court agrees.

C. "Unlawful Remuneration"

The federal anti-kickback statute is set forth at *42 U.S.C. § 1320a-7b(b)(2).* It bars, in pertinent part, the willful "pay[ment] ... directly or indirectly" of "any remuneration" to "refer an individual to a person for the furnishing ... of any item or service" that is reimbursable under the Medicaid program.[13] Standing alone, this language could, on its face, be construed to prohibit all types of wages (as a form of "payment") by a Medicaid provider to its employees for the solicitation of even perfectly legitimate business for the provider.

The federal, statute, however, contains statutory and regulatory exceptions for precisely the type of employer-

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[13] *42 U.S.C. § 1320a-7b(b)(2)* thus provides:

> **(b) Illegal remuneration**
>
> ***
>
> *(2)* whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person–
>
> > **(A)** to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program****
>
> shall be guilty of a felony****

employee payments charged by the State in this case. In particular, *42 U.S.C. § 1320a-7b(b)(3)(B)* provides that: "Paragraphs (1) an (2) shall not apply to ... any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services." Accordingly, while Section *1320a-7b(b)(2)* bars "payments" made for the "referral" of Medicaid-eligible patients as "unlawful remunerations," Section *1320a-7b(b)(3)(B)* carves out an exception from this prohibition to allow a Medicaid provider to solicit business through its own paid employees.[14]

In addition to this specific exception for employer-employee payments, *42 U.S.C. § 1320a-7b(b)(3)(E)* creates another exception from the ban on payments for referrals for "any payment practice specified by the Secretary in regulations ...." One of the regulations or "safe harbors" promulgated by the Secretary was, once again, for payments made by employers to employees. *See 42 C.F.R. § 1001.952(i).* This "safe harbor" made explicit what was perhaps only implicit in the statutory exception. According to the secretary, the "payment practices" set forth in the regulations were *not* to be "treated as a criminal offense."[15] The history of the "safe harbors" also repeatedly

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[14] Absent an "intent to defraud" requirement, a statute that seeks to criminalize the "solicitation" of business is also unconstitutional under the First Amendment. *See State v. Bradford*, 787 So.2d 811 (Fla. 2001), discussed in Section II *infra*.

[15] Accordingly, Section *1001.952* provides, in pertinent part:

> The following payment practices ***shall not be treated as a criminal offense*** under section 1128B of the Act and shall not serve as the basis for an exclusion:***

emphasizes that the Secretary intended to prevent criminal prosecution for the types of payment practices described in the "safe harbors."[16]

Florida's anti-kickback statute contains no similar exceptions. On its face, *Fla. Stat. § 409.920(2)(e)* criminalizes

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> (i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2).

(Emphasis added.)

[16] *See* Final Rule, Medicare and State Health Care Programs; Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (General Comments Response No. 1: "If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of the provision"); *id.* (Response No. 9: "The clear congressional intent behind the development of these safe harbor provisions is to define innocuous arrangements that should not be prosecuted, including the statutory exceptions).

all payments made in return for the "referral" of patients.[17] The Court, however, finds that the application of Section *409.920(2)(c)* to employer-employee payments would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Geier*, 529 U.S. at 873, which plainly intended to exempt such payments from criminal prosecution. Accordingly, the Court holds that Section *490.920(2)(c)* is unconstitutional as applied in this case under the Supremacy Clause and the principles of implied conflict preemption previously discussed. And, as described below, none of the arguments presented by the State in support of the Information have any merit.

First, the State contends that this case does not even present a situation that should trigger a preemption analysis because, according to the State, the federal Medicaid act itself bars Medicaid providers from soliciting business directly from Medicaid-eligible patients. However, the State has cited no Medicaid statute or regulation to support this broad contention,

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[17] Section *409.920(2)(c)* provides:

> **(2)** It is unlawful to:***
>
> **(c)** Knowingly solicit, offer, pay, or received any remuneration including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program.

and the Court finds that the State's argument is contrary to the plain and unambiguous language of Sections *1320a-7b(b)(2)* and *1320a-7b(b)(3)(B)*. As discussed above, these provisions only bar "payments" for "referrals" when the payments are made to third parties who are *not* bona fide employees. The two cases relied upon by the State, *United States v. Polin*, 194 F.3d 863 (7th Cir. 1999), and *United States v. Lahue*, 261 F.3d 993 (10th Cir. 2001), do nothing to alter this analysis, because neither case involved payments by an employer to an employee or, indeed, any contention that the payments in question were protected by the employer-employee exception and "safe harbor."

Polin involved a classic kickback scheme between a pacemaker distributor and medicaid providers, a doctor and nurse. The providers agreed to pay a pacemaker salesman $50 for each patient he referred to them and were justly convicted of violating the federal anti-kickback statute. However, the pacemaker salesman never contended that he was an "employee" of the medicaid providers, and any such a contention would have made no sense under the facts of the case. Not surprisingly, the employer-employee exception and "safe harbor" were not discussed or even cited. *Polin* is simply inapposite to the issues before the Court.

Even more inapposite is the other case relied upon by the State, *Lahue*. In that case, a hospital attempted to circumvent the ban against referral payments by entering into "consulting" contracts with doctors, paying the doctors "consulting" fees in return for patient referrals to the hospital. Again, there was no contention even made by the "consultant" doctors that they were employees of the hospitals. As in *Polin*, the employer-employee exception and "safe harbor" were not discussed or cited anywhere in the opinion. Perhaps the issue was not reached because the court in *Lahue* considered the "consulting" contracts as shams. In essence, the consulting services provided by the doctors were "minimal to none" and the compensation far

exceeded the value of the services. *Lahue*, 261 F.3d at 1000. There are no such allegations in this case.

Second, the State argues that even if some types of employer-employee payments are exempt from prosecution as "unlawful remunerations," the commission-based ***method*** of payment utilized in this case, *i.e.*, paying drivers on a "per head" basis, took the payments out of the federal "safe harbor." Once again, the Court cannot agree. The State has cited no statute, regulation or case holding that a commission-based payment method is *per se* unlawful under federal law. Indeed, the very opposite appears to be true.

As the defendants accurately pointed out, in promulgating the employee "safe harbor" in 1991, the Office of Inspector General ("OIG") explained the intended broad scope of the protection: "The proposed exception for employees permitted an employer to pay an employee ***in whatever manner he or she chose for having that employee assist in the solicitation of program business....***" Final Rule, Medicare and State Health Care Program: Fraud and Abuse; OIG Anti-Kickback Provisions, *56 Fed. Reg. 35952* (July 29, 1991) (Proposed Safe Harbors) (emphasis added). This language refutes the State's argument that the "safe harbors" were intended to exclude the "manner" of payment chosen by Harden in this case, *i.e.*, a commission-based "manner" of payment as opposed to a periodic wage or salary.[18]

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[18] The State's attempted application of Section *409.920(2)(c)* to employer-employee payments is also inconsistent with the separate "patient brokering" statute, *Fla. Stat. § 817.505*. Subsection (1)(a) of that statute makes it a crime for "any health care provider" to "pay any commission ... in any form whatsoever, to induce the referral of patients of patronage from a health care provider or health care facility." However, Subsection (3)(a) exempts from this otherwise broad prohibition any "payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder." As discussed

Although the State has cited no cases in support of its contrary theory, it contends that two of the cases cited by Harden, *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), and *New Boston General Hospital, Inc. v. Texas Workforce Comm.*, 47 S.W.3d 34 (Tex. App. 2001), actually support the State's restricted construction of the "safe harbor." The State, however, has misread these cases.

In *Obert-Hong*, a federal court dismissed a *qui tam* action brought against a hospital. The hospital had entered into contracts with doctors. Under these contracts, the hospital would purchase the doctors' practices, transform the doctors into hospital employees and, in return, require the doctors to refer patients to the hospital as a condition of their employment. The opinion makes clear that the amounts paid to the doctors under the employment aspect of the contracts were expressly based on "a percentage of fees collected for referred patients." *Obert-Hong*, 211 F. Supp. at 1047.[19] That is, the doctors were paid on

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in the text, *Section § 1320a-7b(3)(B)* and a regulation "promulgated thereunder," *42 C.F.R. § 1001.962(i)*, not only fail to prohibit but affirmatively ***approve*** payments by an employer to its employees for the referral of Medicaid-eligible patients. Section *817.505(3)(a)* strongly suggests that the Florida Legislature intended to adopt the protections accorded by federal law. Thus, the Florida Legislature never intended that state criminal sanctions punish activity protected by federal law.

[19] In contrast to the situation in *Lahue*, where a hospital's consulting services contracts with doctors were shams, in *Obert-Hong*, the court also noted that the price the hospital paid to the doctors to initially purchase their practices was "commercially reasonable" and based on "fair market value." *See Obert-Hong*, 211 F Supp. at 1047, 1049.

a commission basis, similar to the manner in which Harden paid the drivers in this case.

The State erroneously seizes upon language in the opinion to the effect that the payments to the doctors would be "exempt" from prosecution under the employer-employee exception and "safe harbor" "unless" they were "directly related to referrals" and were "contingent on volume or value of referrals...." *Id.* at 1050. This language in the opinion does not alter the Court's conclusions.

The language relied upon by the State and discussed in the *Obert-Hong* opinion stems from a ***different*** set of employer-employee "safe harbors" that apply ***only*** to physicians, *42 U.S.C. §§ 1395nn(e)(2) and (5).* Under Section *1395nn(e)(2)*, an amount "paid by an employer to a physician ... who has a bona fide employment relationship with the employer" is exempt only so long as the remuneration "is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician."[20] Similarly, under

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[20] *42 U.S.C. §§ 1395nn(e)(2)* provides, in pertinent part:

> **(e) Exceptions relating to other compensation arrangements**
>
> The following shall not be considered to be a compensation arrangement described in subsection (a)(2)(B) of this section:
>
> ***
>
> **(2) Bona fide employment relationships**
>
> Any amount paid by an employer to a physician (or

Section *1395nn(e)(5)*, an amount paid by a hospital to recruit a physician to join the hospital is permitted only so long as the "amount of remuneration" paid to the doctor for his practice is "not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physicians."[21]

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an immediate family member of such physician) who has a bona fide employment relationship with the employer for the provision of services if--

(A) the employment is for identifiable services,

(B) the amount of the remuneration under employment–

(i) is consistent with the fair market value of the services, and

(ii) is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician,

(C) the remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made to the employer, and

(D) the employment meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse...

[21] *42 U.S.C. §§ 1395nn(e)(5)* provides, in pertinent part:

(e) Exceptions relating to other compensation arrangements

The following shall not be considered to be a

No such qualifying language, however, appears in either the statutory exception (*42 U.S.C. § 1320a-7b(b)(3)(B)*) or the safe harbor (*42 C.F.R. § 1001.952(i)*) relied upon by the defendants in this case. The presence of such qualifying language ***only*** in the physician-employee provisions suggests that Congress' omission of similar qualifying language for non-physician employees, such as the drivers in this case, was intentional: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 446 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (citation omitted). *Accord Bates v. United States*, 522

> compensation arrangement described in subsection (a)(2)(B) of this section:
>
> ***
>
> **(5) Physician recruitment**
>
> In the case of remuneration which is provided by a hospital to a physician to induce the physician to relocate to the geographic area served by the hospital in order to be a member of the medical staff of the hospital, if–
>
> (A) the physician is not required to refer patients to the hospital,
>
> (B) the amount of the remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician, and
>
> (C) the arrangement meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse.

U.S. 23, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997).

Moreover, under *Obert-Hong*, the payment method employed in this case would be legal, even for a physician:

> The fact that some doctors' compensation was entirely based on a percentage of receipts, as opposed to base salary plus bonus, is also immaterial. Payments based on personally performed services are permissible.

Id. at 1051. Paying the doctors by commission would only be illegal, under *Obert-Hong*, if the doctors had been paid based on the "value of the referrals" themselves, *i.e.*, a percentage of the funds the hospital received back from Medicaid. *Id.*

The drivers in this case were paid, according to the State, based on "personally performed services," their ability to solicit and transport Medicaid-eligible children to Harden's facility. Such a payment method would be legal and protected, even under the more stringent requirements applicable to physician-employees. Hence, *Obert-Hong* does not advance the State's position; it contradicts it.

The Court also disagrees with the State's reading of *New Boston General Hospital*. In that case, a nurse in Texas sued her former hospital-employer for back wages and an unpaid bonus. One of her duties as a nurse was to recruit patients from nursing, retirement and assisted living facilities. Like the drivers in this case, she was paid on a commission basis. The defendant hospital sought to defend the action by claiming that the nurse's employment contract was against public policy because it allegedly violated the federal and state (Texas) anti-kickback provisions. The court, however, rejected this argument, holding that the manner of payment was exempt under the "various

statutory exceptions and safe-harbor provisions." *New Boston General Hospital*, 47 S.W.3d at 39. The court did not discuss these provisions in detail but cited to three of them: The federal exception in *42 U.S.C. § 1320a-7b(b)(3)(B)*, the federal "safe harbor" in *42 C.F.R. § 1001.952* and a more limited Texas provision, *Tex. Health & Safety Code Ann. § 161.091(e) & (f)*. The latter provision, unlike federal law, protects employer-employee payments only "provided the remuneration ... is not based on the volume or value of patient referrals." *Id.* at 39, quoting the Texas statute.[22]

Boston General Hospital, therefore, is as unhelpful to the State's position as *Obert-Hong*. The federal statutory exception and "safe harbor" at issue in this case do not include the "volume or value" limitation contained in the Texas statute. The flat, per-child rate of payment utilized here fell squarely within both the employer-employee statutory exception and "safe harbor." Section *409.920(2)(3)* is thus preempted by federal law and is unconstitutional as applied in this case.

D. Willfulness Versus "Should Be Aware"

The court also finds that the State's attempt to criminalize "unlawful remunerations" under a different, more diluted *mens rea* requirement, is preempted by federal under the Supremacy Clause.

As previously noted, the federal anti-kick back provision requires proof that each defendant "willfully" violated the law. Under federal law, the term "willfulness" means "that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Bryan v.*

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[22] Thus, the Texas provision is similar to the physician-employee exception at issue in *Obert-Hong*.

United States, 524 U.S. 184, 193, 118 S.Ct. 1939, 1946, 141 L.Ed.2d 197 (1998). In sharp contrast, Florida's anti-kickback statute, *Fla. Stat. § 409.920(1)(d)*, requires only that the State prove that a defendant acted "knowingly," which, in turn, is defined as something less than mere negligence. Section *409.920(1)(d)* defines the term "knowingly" to encompass situations where the defendant either "is aware ***or should be aware*** of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." (Emphasis added.)

As Harden points out in his motion, the legislative history of the 1977 amendments that added the "willfulness" requirement to the federal statute demonstrates that the intent behind the requirement was to prevent criminal culpability for mere negligence – *i.e.*, conduct that, "while improper, was inadvertent." *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399 n. 16 (9th Cir. 1995), quoting H.R. No. 96-1167, 96th Cong., 2d Sess. 59 (1980). Yet, that is precisely the type of conduct that, by the express requirement of the Florida legislature, would fall within the scope of every state prosecution. Inadvertent but negligent conduct is hardly the same as acting "with an evil-meaning mind." Since Congress intended to prevent kickback criminal prosecutions based on mere negligence, enforcement of Section *409.920(1)(d)* would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade* 505 U.S. at 98. Hence, the Court holds that it is pre-empted by federal law. *See Randall v. Lukhard*, 709 F.2d 257, 267 (4th Cir. 1983) (holding that Virginia's burden of proof provisions in its transfer of assets rule under the Medicaid Act were invalid in light of less restrictive federal requirements), *modified in part*, 779 F.2d 966 (4th Cir. 1984) (en banc) (construing Virginia's burden of proof provision so as not to conflict with federal standard), *cert. denied*, 469 U.S.

872, 105 S.Ct. 222, 83 L.Ed.2d 152 (1984).[23]

II. Other Constitutional Defects

A. The First Amendment

The Court also finds that the State's attempted application of the undefined term "unlawful remuneration" in Section 409.920 to a Medicaid provider's "solicitation" of patients, at least those solicitations made by its own employees, is unconstitutional as applied under the First Amendment. In *State v. Bradford*, 787 So.2d 811 (Fla. 2001), and *State v. Cronin*, 801 So.2d 94 (Fla. 2001), the Supreme Court of Florid found unconstitutional under the First Amendment a provision of *Fla. Stat. § 817.234(8)*, a statute that criminalized businesses or their "private employee[s]" from "solicit[ing] any business" at any hospitals or courts and lawyers from "solicit[ing] any business" for the "purpose of making motor vehicle tort claims or claims for personal injury protection benefits...." Although the intent of the statute was to prevent fraud, the statute did not require proof of an "intent to defraud." The Supreme Court in *Bradford* declared the statute unconstitutional, despite the Legislature's good intentions, because it prohibited all "solicitation" for any purpose, including "totally lawful conduct," such as constitutionally protected commercial speech and advertising. *Bradford*, 787 So.2d at 823, 825.

> While the statute, as drafted, may prevent or deter fraud, its criminal net also captures legitimate and otherwise lawful

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[23] Under this aspect of the Court's ruling, the Information would be defective even if the State had charged the "unlawful remuneration," as payments by drivers to patients, rather than as the (exempt) employer-employee payments.

> conduct, the State's semantics notwithstanding. As the First District's opinion in *Cronin* points out, "every solicitation of business from an accident victim...has the potential of being funded by the proceeds of a tort settlement or PIP claim." [*State v. Cronin*, 774 So.2d 871, 876 (Fla. 1st DCA 2000).] There is, however, absolutely nothing sinister about presenting honest and legitimate requests for compensation from a PIP carrier or filing a tort claim based on damages sustained in an automobile accident. Absent the element of fraud, which we have already concluded is not part of this statute, this subsection criminalizes conduct which is entirely lawful and within the protections voiced by the United States Supreme Court.

Bradford, 787 So.2d at 824. The Supreme Court emphasized that the principle defect in the statute was its failure to "include fraudulent intent as an element of unlawful insurance solicitation." *Id.* at 814. *See also State v. Cronin*, 801 So.2d 94 (Fla. 2001) (affirming First District's decision in *State v. Cronin*, 774 So.2d 871, 876 (Fla. 1st DCA 2000), on the basis of *Bradford*); *Bailey v. Morales*, 190 F.3d 320 (5th Cir. 1999) (invalidating Texas statute prohibiting chiropractors from soliciting potential clients in person or by telephone).

The court holds that Section *409.920(2)(e)* and *409.920(1)(d)* are unconstitutional for the same reasons set forth in *Bradford*. There is "nothing sinister" about a Medicaid provider hiring employees to either solicit patients or provide the type of transportation services that the Medicaid Act

contemplates.[24] Absent an "intent to defraud" such conduct is constitutionally protected.

The Court does not mean to suggest that it would be constitutionally protected for the drivers to pay money to the patients to induce them to use Harden's services. However, as already discussed, although the State contends that such conduct was occurring, it has chosen not to base the charges in the Information on that theory. Instead, the State has defined the allegedly "unlawful remunerations" in this case as the wages paid to the drivers for the solicitation and transportation of Medicaid eligible patients. The Court finds that the latter conduct is not only pre-empted by the federal Medicaid laws but constitutionally protected activity, absent an intent to defraud requirement ***in the statute***–or at least a "willfulness" requirement that state law does not presently require.

B. Vagueness

The First Amendment defect in Section 409.920 leads the Court to also hold that the statute is unconstitutionally vague for failing to define the operative term "unlawful remuneration" in a manner that would avoid the statutory and constitutional pitfalls outlined above. The term "unlawful remuneration" is vague because it does not give a Medicaid provider fair "notice" that paying even its own employees to "solicit" business is (allegedly) unlawful. *See generally Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002) (holding Indiana Medicaid fraud statute unconstitutional because it failed to define unlawful "claims" to specifically include claims that exceeded a provider's "usual and customary charges").

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[24] *See, e.g., 42 U.S.C. § 1396a(a)(43(B); 42 C.F.R. §§ 441.62, 431.53;* and *Fla. Stat. § 409.905(12).*

Although federal courts have rejected various vagueness attacks on the ***federal*** Medicaid statute, that statute, unlike its state counterpart: (1) requires that the prohibited conduct be done "willfully" before it can be prosecuted; and (2) makes an effort, through statutory exceptions and administrative "safe harbors," to distinguish between lawful conduct and "unlawful remuneration." Courts that have rejected vagueness challenges to the federal Medicaid statute have expressly done so because of these added protections. *See e.g., United States v. Starks,* 157 F.3d 833, 839 (11th Cir. 1998); *Hanslester*, 51 F.3d at 1398; *United States v. Bay State Ambulance and Hosp. Rental Serv. Inc.*, 874 F.2d 20, 32-33 (1st Cir. 1989). *See generally Hoffman Estates v. Flipside*, 455 U.S. 489, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (when evaluating a statute for vagueness, directing courts to examine whether the statute contains a scienter requirement mitigating the vagueness and whether it threatens any constitutionally protected rights).

Section 409.920 has no statutory exceptions and no ameliorating definitions of the term "unlawful remuneration." Yet, it permits criminal prosecution on an extremely diluted *mens rea* requirement that, as previously discussed, impinges on constitutionally protected speech. If not pre-empted by the federal statute, the term "unlawful remuneration" in Section 409.920 is unconstitutionally vague as applied in this case.

Conclusion

For all of the foregoing reasons, the Court holds that *Fla. Stat. § 409.920* is unconstitutional and/or its application barred under the undisputed facts of this case. Accordingly, the Court ORDERS AND ADJUDGES that the Information be DISMISSED.

DONE AND ORDERED in Miami, Dade County, this 5th day of February, 2003.

THE HON. DAVID MILLER
CIRCUIT COURT JUDGE

APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA, **CASE NO. F00-38785(14)**

Plaintiff, **Judge: DAVID MILLER**

v.

GABRIEL HARDEN (A) **OSWP Case No. 2000-0110-SFB**

Defendant.

_____/

STATE'S MOTION TO STRIKE DEFENDANT'S SWORN MOTION TO DISMISS INFORMATION

COMES NOW the Office of Statewide Prosecution, by and through Statewide Prosecutor MELANIE ANN HINES and her undersigned Assistant Statewide Prosecutor and moves this Honorable Court for an Order Striking Defendant's Sworn Motion to Dismiss as legally defective under Florida Rules of Criminal Procedure 3.190(c)(4) and as grounds therefore would show the following:

1. The motion's jurat is defective in that Defendant does not swear but only states that these facts are true and correct.

2. The facts contained within the motion are nothing more than recitation of third party depositions labeled as Exhibit "A",

Deposition of Karen Lee, an unidentified Composite Exhibit "B" and an Exhibit "C" Deposition of Victor Rivera, none of which were attached to the motion provided to the State. State v. Kagan, 529 So. 2d 356 (4th DCA 1988).

3. Sworn motions to dismiss cannot be based on the sworn statements of other individuals, but rather on the sworn factual allegations of the Defendant. Depositions can only be used to support Defendant's allegations. State v. Kagan, id.

4. Many of the alleged facts are stated in the disjunctive, i.e. Dental Express and/or Mr. Harden, leaving it unclear as to who is alleged to have committed a certain act.

5. Many of the excerpts of depositions are nothing more than the expressions of opinions of third parties.

6. Lastly, the defendant attempts to bolster his position by stating that the lead agent conceded that the payments in dispute were not illegal renumerations and that the case agent admitted that she did not know of any legal authority to support the State's case. It is almost too obvious to state that it is not only inappropriate to ask lay people in deposition their legal opinion as to the issues in dispute, such opinions are of no relevance to a motion

to dismiss.

WHEREFORE, the State respectfully requests this Court to strike Defendant's Motion to Dismiss Information.

Respectfully submitted,

/s/

OSCAR GELPI
Assistant Statewide Prosecutor
110 S.E. 6th Street, Suite 1400
Fort Lauderdale, FL 33301
(954) 712-4950
FL Bar No. **382345**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to Anthony C. Vitale, Esq., 799 Brickell Plaza, Suite 700, Miami, FL 33131; on this 10th day of December, 2002.

/s/

OSCAR GELPI
Assistant Statewide Prosecutor

APPENDIX F

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,	**CASE NO. F00-38785 A**
Plaintiff,	**JUDGE: DAVID MILLER**
v.	
GABRIEL HARDEN (A)	**OSWP CASE NO. 2000-0110-SFB**
Defendant.	

_____/

STATES TRAVERSE/DEMURRER TO DEFENDANT HARDEN'S SWORN MOTION TO DISMISS

COMES NOW MELANIE ANN HINES, Statewide Prosecutor, by and through the undersigned Assistant Statewide Prosecutor, and files this Traverse and Demurrer to the Sworn Motion to Dismiss heretofore filed in this case on behalf of the Defendant, GABRIEL HARDEN, and pursuant to Rule 3.190(d) of the Florida Rules of Criminal Procedure, specifically denies the following factual matters alleged in said motion, to wit:

1. The State specifically denies 5(e).
2. The State denies 5(h).

The State further demurs and alleges the following additional material facts:

1. Defendant paid drivers to recruit Medicaid

eligible children who had not been treated in the last six months to come to the clinic for treatment. Said payments were made for each eligible child.

2. Defendant was aware of and reimbursed drivers for payments made by the drivers to the children and or parents, usually $5.00 per child. Said payments were for the purpose of inducing the children to attend Defendant's denial clinic for treatment under the Medicaid program. Defendant did not fire drivers for paying children on their parents.

STATE OF FLORIDA
COUNTY OF BROWARD

Personally appeared before me OSCAR GELPI, Assistant Statewide Prosecutor for the State of Florida who being first duly sworn say that this Traverse is filed in good faith and certifies that testimony was received under oath from witnesses which support the allegations contained in the foregoing Traverse.

/s/
OSCAR GELPI
Assistant Statewide Prosecutor

Before me personally appeared OSCAR GELPI who is personally known to me and who did take an oath.

/s/
NOTARY PUBLIC
State of Florida

Respectfully submitted,

/s/

OSCAR GELPI
Assistant Statewide Prosecutor
Office of Statewide Prosecution
110 S.E. 6th Street, Suite 1400
Fort Lauderdale, FL 33301
(954) 712-4950
Florida Bar No. 382345

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to **Ronald J. Manto, Esq.** (Counsel for E. Cortorreal) at 2937 SW 27th Avenue, Suite 107, Coconut Grove, FL 33133; **Tony Moss, Esq.** (Counsel for V. Carter) at 851 NE 118th Street, Miami, FL 33161; **Anthony C. Vitale, Esq.**, (Counsel for G. Harden) at 799 Brickell Plaza, Suite 700, Miami, FL 33131; **Steven Bustamante, Esq.** (Counsel for E. Polsky) at 8500 SW 92nd Street, Suite 202, Miami, FL 33156; **Michael Band, Esq.** (Counsel for M. Rodriguez) at 2601 S. Bayshore Drive, Suite 1600, Miami, FL 33133; **Aubrey Rudd, Esq.** (Counsel for H. Goss) at 7901 SW 67th Avenue, Suite 206, Miami, FL 33143; **Robert Columbe, Esq.** (Counsel for F. Johnson) at 19 West Flagler Street, Suite 720, Miami, FL 33130; **Julie Clark, Esq.** (Counsel for B. Madison) at Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125; **Annette Gomez, Esq.** (Counsel for B. Smith) at 1644 NW 17 Avenue, Miami, FL 33125, on this 10th day of December, 2002.

/s/

OSCAR GELPI
Assistant Statewide Prosecutor

APPENDIX G

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA, **CASE NO. F00-038785**

Plaintiff, **JUDGE: DAVID MILLER**

vs.

OSWP CASE NO. 2000-0110-SFB

GABRIEL HARDEN (A)
EDWARD POLSKY (B)
MARIA RODRIGUEZ (C)
ELSA CORTORREAL (D)
BRUCE SMITH (E)
HERBERT GOSS (F)
FLORA JOHNSON (G)
BILLY MADISON (I)
VONSHELLA CARTER (J)

Defendants.

_____/

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE INFORMATION

COMES NOW the Office of Statewide Prosecution, by and through Statewide Prosecutor MELANIE ANN HINES and her undersigned Assistant Statewide Prosecutor, and respectfully moves this Court to deny the Defendant's Motion to Dismiss the Information. In support of this motion, the State states the following:

1. STATEMENT OF FACTS

From December 1, 1998 until June 1, 2000, the defendant, Reggie Harden owned and operated a Dental management company principally under the title of Dental Express in South Florida. Mr. Harden is not a dentist, but employed dentists to perform work exclusively on Medicaid eligible children. Edward Polsky, Maria Rodriguez and Elsa Cortorreal were three dentists employed by Harden. The work performed on the children almost always consisted of cleaning and coating teeth, which can be billed to Medicaid every six months per child.

Medicaid eligible children were brought to the clinic by drivers who were paid by Mr. Harden or members of Mr. Harden's staff. The method of payment was usually 25 to 30 dollars cash which would be given to each driver for each Medicaid eligible child the driver could find and bring into the clinic. The driver would usually go into economically deprived neighborhoods and solicit children or their parents to go to the dentist. The solicitation usually involved a five dollar payment to either the child or the parent. The parent would usually sign a consent form and the driver would deliver a load of children to the clinic. The delivery would take place between 5 p.m. and 9 p.m. After treatment, the drivers would take the children home. None of the children had a prior appointment at the clinic. Upon arrival, the administrative staff, which included Flora Johnson and Victor Rivera, would check each child for Medicaid eligibility and parental consent. If the child was eligible, they were treated. If a dentist could clearly see that a child had a cleaning or coating within the last six months, the child would not be treated, since Medicaid will not reimburse the service.

The drivers would wait in the clinic to be paid and return the children. They would also help control the children while at the clinic. The clinic did not want any suspicious billings which might bring scrutiny from Medicaid investigators. If a child was not eligible; had fraudulent paper work; was not who he claimed

to be or had recently been treated, the drivers were not paid the 25 to 30 dollars. They were, however, paid 5 dollars to reimburse them for the money they paid the parent or child. They were always paid in cash. If a dentist rejected a child as recently treated, the driver after getting 5 dollars, would often insist on going to the treating dentist for an explanation of why they only got 5 dollars, and the dentist would explain. Therefore, the dentists, who had nothing to do with the actual paying of the drivers, knew of the method of driver payments. Driver Karen Smith told an investigator that the dentists actually wrote how much to pay the driver on each child's chart.

The problem of drivers attempting to slip ineligible or recently treated children into the clinic became so pervasive that clinic staff began to take pictures of each child to better keep track of who was coming in. The staff, who included Flora Johnson and Victor Rivera, also kept records of the children brought in by each driver so they could be paid accordingly.

Vonshella Carter was one of the drivers paid by Mr. Harden to bring in Medicaid eligible children on a per capita basis. Harden calls the drivers his "employees". He gave the drivers W-2 forms, but never withheld any taxes. He also would occasionally lease or rent the buses the drivers used. Three children have given sworn statements that Ms. Carter gave them five dollars to go with her.

The drivers were recruited and trained, per Mr. Harden's instructions, by Bruce Smith and Herbert Goss. On occasion, Smith and Goss also were responsible for the actual paying of the drivers on the basis of per capita Medicaid eligible child. Felisia Jackson, a driver, has stated that Smith and Goss told her not to tell anyone about paying five dollars to children or their parents.

Victor Rivera, who previously pled guilty in this case paid the drivers for a period of time. Ultimately he trained Billy

Madison to take over the payments to drivers. Madison was given cash and the list of children each driver brought in. He would then calculate what each driver was owed based on the number of Medicaid eligible children they brought in, and pay each driver accordingly in cash.

Between December 1, 1998 and April 28, 2000, Dental Express received deposits from the State of Florida Medicaid system totaling $2,546,272.10. During that period Dr. Cortorreal received $389,246.20, Dr. Polsky received $808,232.85 and Dr. Rodriguez received $171,888.30.

2. The Defense cites the federal "Medicaid Act" 42 U.S.C. 1396 (2002) and OIG Report No. OEI-09-93-00240 April 1, 1996 as evidence that Florida is somehow not supplying all the dental services it is obligated to preform under the Federal Act. It is the position of the State that the Defendant's argument is irrelevant and has no bearing on a Florida criminal prosecution. If the defendant believes that Florida is not living up to its obligations, the proper recourse would be to sue the Florida Agency for Healthcare Administration in Federal Court. The defendant's argument cannot constitute a defense or an excuse for committing Medicaid Fraud.

3. The Defense contends that the mens rea required to convict the defendants is "knowingly and willfully" and Florida's statute is invalid as a consequence of it only requiring "knowing" as the mens rea standard. This is predicated on the assumption that federal law preempts Florida's statute on the issue of burden of proof.

The defendant is correct that the federal statute contains a mens rea standard of "knowingly and willfully", while the Florida statute only requires that the defendant act knowingly. The defendant however, fails to demonstrate how the state statute is in conflict with the federal statute so as to make the

state's statute void under the doctrine of preemption. The defendant claims that implied conflict preemption in which "compliance with both Federal and State law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" (citing *Gade v. National Solid Waste Management*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992)) is the category of preemption that this Court must consider. Having made that argument the Defendant then goes off on a tangent and reiterates his claim that state legislatures have frequently attempted to limit their obligations under the Medicaid Act. In support of that irrelevant assertion, the defendant goes on to cite numerous cases. Predictably, none of these cases concern the payment of kickbacks for patient referrals. Those cases deal with state statutory schemes that conflict with or undermine the provision of services under the Medicaid program and therefor the cases cited therein are inapposite. None of these cases address the issue of kickbacks for referrals.

Returning to at least the heading if not the thrust of defendant's argument on this issue, it is clear that the difference in the language of the statutes merely changes the burden of proof.

As stated previously, under the state statute the State only has to show that it was a knowing violation while under the federal statute it has to be both knowing and willful. There is nothing in the Defendant's argument or recitation of cases that demonstrates how this difference in burden of proof conflicts with the stated purposes and goals of the federal scheme which is the linchpin of defendant's argument. The burden of proof in this case applies to conduct that has been defined by the Federal government as unlawful, i.e. the payment for referrals of patients. A different burden of proof does not undermine either congressional intent in the disbursement of Medicaid services nor Congress' intent in preventing fraud in the disbursement of

these services.

There is no case law which stands for the proposition that state statutes must be identical in every respect to its federal counterpart. If that were the case, our analysis here would be exceedingly clear. The court would only have to examine the state and federal statutes side by side to determine whether every word were identical and if not the state statute would be invalidated.

Obviously that is not the case so we start from the proposition that state and federal statutes on the same subject can be different and yet in harmony. In the case at bar, the state has seen fit to have a different standard of mens rea than the federal statute. Contrary to the defense's assertion, the state makes no effort to "define fraud" or otherwise criminalize conduct not already criminalized by the federal statute. The statute in question deals with payment of goods or services in return for the referral of patients under the Medicaid program. That conduct is *illegal* under the federal statute as well as the state statute. Florida has simply made it *easier to prove the offense* by requiring a lesser standard of knowledge. There can be no conflict or undermining of Congress' intent where the conduct criminalized under both statutes is identical. An individual who refrains from paying for the referral of patients is in fact in compliance with both federal and state law, i.e. it is not impossible to comply with both state and federal law at the same time. In fact, it is exceedingly simple. It cannot be said that by making it easier to prosecute individuals for paying kickbacks for patient referrals that Florida undermines congressional intent when it is clear that the congressional intent was to criminalize the payment of such referrals.

As for the defendant's concern that the Medicaid statute is "among the most intricate ever drafted by Congress" with a "Byzantine construction" (defendant's motion at page 30) while that may be true of the Medicaid statute in general, there is

nothing complex, intricate or abstruse about the statutory prohibition against unlawful kickbacks. Defendant's assertion that the statute must contain "willful" to avoid prosecution for inadvertent or negligent conduct simply finds no support in logic or common sense. The conduct in question, the deliberate payment of money for the referral of patients, cannot be described as either inadvertent or negligent. It is a deliberate, conscious act by the defendant. Contrary to the defendant's assertion the State has not adopted a negligence standard. The conduct is so outside of normal medical practice as to raise in the minds of the defendants questions as to the legality of his actions especially considering they were always paid in cash. At the very least the conduct would evidence a careless disregard of whether a person has the right to so act. *Bryan v. U.S.* 118 S.Ct. 1939.

Assuming arguendo that the statute is in conflict and the Florida statute must include a willful standard, the statute can be salvaged by the court by simply requiring that higher standard by a special jury instruction.

4. The Defense contends that a statutory exception and administrative "safe harbor" for payments to employees protects the defendants in the case at bar, and cites 42 U.S.C. 1320 A-7b(b)(3) which protects "employees" who "provide covered items and services". Recruiting patients is not a covered item or service. That phrase relates to items or services provided to patients.

The defense cite *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp 2d 1045 (N.D. Ill 2002) which dismissed a fraud suit against a hospital for requiring employee doctors to refer patients to the defendant hospital. It is understandable that such a request would not be illegal, but that is not the activity in the case at bar. As *Obert-Hong* points out, employee compensation is exempt "unless directly related

to referrals" Ibid. 1049 and "provided the compensation arrangements are not contingent on the volume or value of referrals, there is no economic incentive for the doctor to refer patients to that hospital" Ibid. 1049. *Obert-Hong* addresses the "safe harbor" requirement by explaining that kick-back statutes are "designed to remove economic incentive from Medicaid referrals, not to regulate typical hospital-physician employment relationship." Ibid at 1049.

The defendants also cite *New Boston General Hospital Inc. v. Texas Workforce Comm.*, 47 S.W. 3d 34 (Tex. App. 2001) to support their position. In *New Boston* a Hospital paid an employee a flat fee for each nursing home she recruited to have their patients treated at a specific clinic. This arrangement was determined to meet "safe harbor" requirements because "remuneration is set in advance, is consistent with fair market value of the service and is not based on the volume or value of patient services". Ibid p. 38.

This concept is further illustrated by *United States v. Polin*, 194 F.3d 863, where a doctor and nurse employed by a medical facility paid a representative for each Medicaid patient referral, and were found to have violated the Medicaid Anti-Kickback Act.

Defendant's version of the federal safe harbor provision would swallow up the criminal statute. Under defendant's scenario patient referrals would be legal so long as there was any sort of employment relationship. That interpretation would completely defeat Congress' purpose of removing the financial incentive for solicitation. As interpreted by the defendant Federal law would exist solely to encourage the establishment of an employee-employer relationship while turning a blind-eye to kickbacks for patient referrals, contrary to the clear congressional intent to criminalize payment for patient referrals.

5. The Defendant's first amendment arguments find no support in the law. There is no first amendment right to pay kickbacks for patient referrals and both the federal government and the State of Florida clearly prohibit such activity.

First and foremost the Medicaid program is a voluntary program. No state is required to be a part of it and no individual can be coerced to be a Medicaid provider. Once someone or some state however, decides to become a part of the program they are bound by all the rules and regulations of the program as was so ably argued in defendant's motion. One of the rules of the Medicaid program is that a provider cannot pay kickbacks for patient referrals. Whatever constitutional right Defendant believes exists to pay kickbacks outside the program has no operation within the voluntary confines of the Medicaid program.

Even outside of the Medicaid arena, the defendant is mistaken as to the reach of *State v. Bradford*, 787 So.2d 811 (Fla.2001). That case invalidated Florida's solicitation statute, F.S. 817.234(8). However, Florida's patient brokering statute F.S. 817.505 was not addressed by Bradford and remains good law. Despite Defendant's semantic efforts, the conduct in the case at bar is clearly the payment of kickbacks for patient referrals, not mere solicitation.

6. Unfortunately for the Defendant, the facts of the case at bar prohibit him from availing himself of the brilliant and stirring arguments mustered in opposition to vagueness in criminal statutes. There is not one word in defendant's forceful and convincing discussion of the evils of vague statutes that demonstrates any vagueness in the statute defendant is now attacking. Defendant attempts to dance around the facts of this case by pretending that there is nothing more at issue here than the innocent transportation of happy children for the purposes of free dental care. What is in fact at issue is the payment of a

kickback in return for referring patients. It would be difficult to construct a statute that is clearer, more definite or more encompassing that F.S. 409.920(e) as to the issue of paying kickbacks for patient referrals. In the recent case of *U.S. v. Lahue*, 261 F.3d 993, the Tenth Circuit upheld virtually identical language in the Federal statute against an attack on vagueness grounds. Clearly, defendant Harden paid his drivers based entirely on the volume or value of patient referrals, and all his "employees" knew it. The State does not concede that defendant Harden's "drivers" were true employees. However, the court need not reach the "employee" issue because the method of payment utilized by defendant Harden does not remotely meet the elements of the safe harbor defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to **Ronald J. Manto, Esq.** (Counsel for E. Cortorreal) at 2937 SW 27th Avenue, Suite 107, Coconut Grove, FL 33133; **Tony Moss, Esq.** (Counsel for V. Carter) at 851 NE 118th Street, Miami, FL 33161; **Anthony C. Vitale, Esq.** (Counsel for G. Harden) at 799 Brickell Plaza, Suite 700, Miami, FL 33131; **Steven Bustamante, Esq.** (Counsel for E. Polsky) at 8500 SW 92nd Street, Suite 202, Miami, FL 33156; **Michael Band, Esq.** (Counsel for M. Rodriguez) at 2601 S. Bayshore Drive, Suite 1600, Miami, FL 33133; **Aubrey Rudd, Esq.** (Counsel for H. Goss) at 7901 SW 67th Avenue, Suite 206, Miami, FL 33143; **Robert Columbe, Esq.** (Counsel for F. Johnson) at 19 West Flagler Street, Suite 720, Miami, FL 33130; **Julie Clarke, Esq.** (Counsel for B. Madison) at Office of the Public Defender, 1320 NW 14th Street, Miami, FL 33125; **Annette Gomez, Esq.** (Counsel for B. Smith) at 1644 NW 17 Avenue, Miami, FL 33125, on this ___day of December, 2002.

_____

JAMES COBB
Deputy Chief Assistant Statewide Prosecutor

APPENDIX H

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 00-38785

Judge Miller

STATE OF FLORIDA,

Plaintiff,

v.

GABRIEL HARDEN, et al.,

Defendants.

_____/

DEFENDANT'S SWORN MOTION TO DISMISS THE INFORMATION

The Defendant, GABRIEL HARDEN, through undersigned counsel, respectfully moves this Court, pursuant to Fla. R. Crim. P. 3.190(c)(4), for an order dismissing the Information against him on the following ground: The "kickbacks" alleged in Counts 1-2, predicate acts, A-G, and Counts 3-9, constituted lawful remuneration paid to bona fide "employees" within the meaning of *42 U.S.C. § 1320a-7b(b)(3)*[25]

---

[25]Section *1320a-7b(b)(3)* provides that the federal anti-kickback statute's prohibition on referral payments:

and *42 C.F.R. § 1001.952(i)*.[26]

This motion is set forth in two parts. Part 1 sets forth the undisputed facts. Part II demonstrates that the undisputed facts

---

> shall not apply to . . . any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items and services . . . .

[26]Section *1001.952(i)* provides in pertinent part:

> **§ 1001.952 Exceptions.**
>
> The following payment practices ***shall not be treated as a criminal offense*** under section 1128B of the Act and shall not serve as the basis for an exclusion:***
>
> (i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee (who has a bona fide employment relationship with the employer) for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2).

(Emphasis added.)

do not establish a prima facie case of the crimes charged in the information.

I. THE MATERIAL UNDISPUTED FACTS

1. Counts 3-9 of the Information allege that Mr. Harden violated the "anti-kickback" provision of the state Medicaid fraud statute, *Fla. Stat. § 409.920(2)(e)*. Section *409.920(2)(e)* makes it unlawful to "knowingly . . . pay . . . any remuneration . . . in return for referring an individual to a person for the furnishing . . . of any . . . service for which payment may be made . . . under the Medicaid program."[27]

2. Section *409.920(2)(e)* does not define the term

---

[27]Section *409.920(2)(e)* provides:

> (2) It is unlawful to:***
>
> (e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program.

"remuneration."

3. In Counts 3-9, the State has charged that Mr. Harden violated Section *409.920(2)(e)* by paying the Dental Express drivers a "per head fee" for the "solicitation and transportation" of Medicaid eligible children "to dental facilities for treatment." *See* Information, pp. 6-9.

4. Counts 1 and 2 charge Mr. Harden with committing and with conspiring to commit "racketeering" in violation of *F.S. 895.03(3)* and *F.S. 895.03(4)*. Both Counts 1 and 2 incorporate, as the predicate "incidents" of racketeering. Counts 3-9 as "incidents" A-G.

5. In fact, the Deposition of the Case Agent, Karen Lee, on September 10, 2002, establishes that the drivers were "employees" of Mr. Harden's companies within the meaning of *42 U.S.C. § 1320a-7b(b)(3)* and *42 C.F.R. § 1001.952(i)*. *See* Deposition of Karen Lee, September 10, 2002, **EXHIBIT A.**

a. Dental Express and/or Mr. Harden hired drivers to pick up patients and transport them to Dental Express to receive dental care. *Id.* at p. 25.

b. Dental Express and/or Harden conducted background checks on the drivers, made copies of their credentials (including their drivers' licenses), and required the drivers to sign tax forms. *Id.* at p. 41.

c. Dental Express and/or Mr. Harden leased many of the vehicles used by the drivers to transport children to the facilities and paid approximately $20,000 in lease payments. *Id.* at pp. 64-66.

d. The wages paid to drivers as well as the lease

payments for the vehicles were documented as business expenses of Dental Express for tax purposes on its books and records.

e. The compensation paid to the drivers was based on the number of children transported to Mr. Harden's companies for dental services (the "per head" fee alleged in the Information). *Id.* at pp. 21, 25, 30.

f. Dental Express and/or Mr. Harden had written policies that prohibited their employees, including the drivers, from offering kickbacks or gratuities of any kind to patients or their families. *Id.* at pp. 38-41; **COMPOSITE EXHIBIT B.**

g. Dental Express required its employees and drivers to acknowledge their awareness of these company policies by signing forms that expressly contained the written prohibition against offering kickbacks. *Id.* at pp. 38-41. **COMPOSITE EXHIBIT B.**

h. Drivers who were discovered violating these policies were fired by Dental Express and/or Mr. Harden.

6. The Deposition of the State witness, Victor Rivera, on August 20, 2002, further establishes that the drivers were "employees" of Mr. Harden's companies within the meaning of *42 U.S.C. § 1320a-7b(b)(3)* and *42 C.F.R. § 1001.952(i). See* Deposition of Victor Rivera, August 20, 2002. **EXHIBIT C.** Mr. Rivera managed the accounting department of Dental Express, including accounts payable, checking and cash payments to the drivers, between October 1999 and October 2000. *See* **EXHIBIT C.** at pp. 8-11.

a. Dental Express paid the drivers on variable rates, depending upon the dental services provided to the patients. *Id.* at p. 26.

b. Although Dental Express paid the drivers in cash, there was nothing illegal about paying in cash because Dental Express kept records of the payments and services provided the patients. *Id.* at pp. 16 ("in paying cash[,] nothing is wrong once you have records of it, like you pay this person this much money for their work performed, that's what I believe"); *id.* at p. 17 ("[a]t the time I thought it was everything right so far" because "I have records with the name and what was paid"); *id.* at p. 56 (he believed paying the drivers was legal since he kept "number one [a] record of how much was paid for the person and social security and stuff like that"; *id.* at p. 56 ("paid in cash is not any crime committed [sic] once you have a record").

c. Indeed, although he pled guilty to crimes as part of his bargain with the State, he still did not believe he did anything wrong. *Id.* at pp. 15-16. *See also id.* at p. 30 ("I never believed that I did anything wrong, honestly"); *id.* at p. 39 (he "never" committed any fraud); *id.* at p. 41 ("[a]s I mentioned before[,], I have not done anything wrong that I know of"). He is also unaware of ***anyone*** at Dental Express committing any crimes. *Id.* at p. 42.

II. THE CHARGES SHOULD BE DISMISSED

In the accompanying motion to dismiss, Mr. Harden has

demonstrated that federal standards preempt state law and that "remuneration" in the form of payments to employees is exempt from criminal prosecution under *42 U.S.C. § 1320a-7b(b)(3)* and *42 C.F.R. § 1001.952(i)*. The remaining threshold issue is whether the drivers hired by Dental Express and Mr. Harden constitute bona fide employees within the scope of the statutory exception and the administrative "safe harbor" for employer-employee relationships.

The safe harbor provision in *42 C.F.R. § 1001.952(i)* expressly states that the term "employee" shall have "the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2)." *See* n. 2 *supra*. Under 26 U.S.C. § 3121(d)(2), an employee for employment tax purposes is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee." A regulation issued by the Treasury Department has noted that the determination of whether a worker constitutes an "employee" turns on the degree of control exercised by the employer over the individual. *See* Treas. Reg. § 31.312(d)-1. The test is not necessary that the employer actually direct or control the manner of the services performed, but rather whether the employee is subject to the will and control of the employer. *Rev. Rul.* 87-41. The IRS has also provided 20 factors to help determine whether sufficient control is present to establish an employer-employee relationship: (1) Instructions; (2) Training; (3) Integration; (4) Services Rendered Personally; (5) Hiring, Supervising and Paying Assistants; (6) Continuing Relationship; (7) Set Hours of Work; (8) Full-Time Required; (9) Doing Work on Employer's Premises; (10) Order or Sequence Set; (11) Oral or Written Reports; (12) payment by Hour, Week or Month; (13) Payment of Business and/or Transportation Expenses; (14) Furnishing of Tools and Materials; (15) Significant Investment; (16) Realization of Profit or Loss; (17) Working For More Than One Firm at a Time; (18) Making Service Available to General Public; (19) Right to Discharge; and (20) Right to Terminate. *Id.*

Based on an application of these factors, the drivers were plainly "employees." Dental Express and/or Mr. Harden maintained hiring and firing power over all the drivers. Their wages were treated as business expenses and a considerable amount of money was spent on the leased vehicles they used. Moreover, Dental Express and Mr. Harden attempted to maintain further control over the drivers by requiring them to sign company policy statements banning illegal activities. Under these circumstances, the drivers were "employees" and not mere "independent contractors." *See Crowd Management Services, Inc. v. Deloretto*, No. 92-36726 (9th Cir. September 4, 1994), *1994 U.S. App. LEXIS 24476, 74 A.F.T.R.2d (RIA) 6372. Lab's Enterprises, Inc. v. United States*, No. 97 CV 4718 (N.D. Ill. Jan. 24, 2000), *2000 U.S. Dist. LEXIS 949; 85 A.F.T.R.2d (RIA) 886.*

The Case Agent in this case, Karen Lee, conceded that paying drivers would not make their salaries illegal remunerations. *See* Deposition of Karen Lee, at pp. 58-59. Ms. Lee's, and apparently the State's, entire theory of criminality rests on the proposition that paying the drivers on a "per head" basis rather than on "a flat salary" somehow made the arrangement illegal. *Id.* at p. 59. Ms. Lee, however, candidly admitted that she did not know of any legal authority to support this distinction, either in the statutes themselves or otherwise. *Id.* at pp. 26-27. Indeed, there is no such support. Under the State's theory, no one hired on a commission basis would ever be considered an "employees."

The Court should conclude that, based on the undisputed facts, the drivers in this case were "employees" of Dental Express and/or Mr. Harden. As such, their wages did not constitute unlawful remuneration, as a matter of law and the information should be dismissed.

Respectfully submitted,

/s/

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[*Of Counsel*]

I HEREBY STATE that I have read the facts set forth in Section I of this motion and they are truce and correct.

/s/

GABRIEL HARDEN

STATE OF FLORIDA

COUNTY OF DADE

BEFORE ME the undersigned authority, personally

appeared GABRIEL HARDEN, personally known to me or has produced _____ as identification, and by me first duly sworn, deposes and says that the foregoing facts set forth in Section I of this motion are true and correct. IN WITNESS WHEREOF I have hereunto set my hand and seal at Dade County, Florida, this 21st day of October 2002.

/s/
NOTARY PUBLIC

_____ /s/
COMMISSION NUMBER PRINTED NOTARY SIGNATURE

MY COMMISSION EXPIRES:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was mailed this 21st day of October 2002 to Oscar Gelpi, Assistant Statewide Prosecutor, Office of Statewide Prosecution, 110 S.E. 6th Street, Suite 1400, Ft. Lauderdale, Florida 33301.

/s/
Anthony C. Vitale

APPENDIX I

42 CFR 441.62

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*** THIS SECTION IS CURRENT THROUGH THE SEPTEMBER 5, 2006 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 42 -- PUBLIC HEALTH
CHAPTER IV -- CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES
SUBCHAPTER C -- MEDICAL ASSISTANCE PROGRAMS
PART 441 -- SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES
SUBPART B -- EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT (EPSDT) OF INDIVIDUALS UNDER AGE 21

Go to the CFR Archive Directory

42 CFR 441.62

§ 441.62 Transportation and scheduling assistance.

The agency must offer to the family or recipient, and provide if the recipient requests--

(a) Necessary assistance with transportation as required under § 431.53 of this chapter; and

(b) Necessary assistance with scheduling

appointments for services.

HISTORY: 49 FR 43666, Oct. 31, 1984.

AUTHORITY: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

NOTES: [PUBLISHER'S NOTE: FEDERAL CASES CITING THIS SECTION -- Dajour B. v. City of New York, 2001 U.S. Dist. LEXIS 15661; DaJour B. v. City of New York, 2001 U.S. Dist. LEXIS 10251]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes affecting Chapter IV appear at 45 FR 53806, Aug. 13, 1980; 50 FR 12741, Mar. 29, 1985; 50 FR 33034, Aug. 16, 1985; 51 FR 41338, Nov. 14, 1986; 53 FR 6634, Mar. 2, 1988; 53 FR 47201, Nov. 22, 1988; 56 FR 8852, Mar. 1, 1991; 66 FR 39450, 39452, July 31, 2001; 67 FR 36539, 36540, May 24, 2002.]

APPENDIX J

42 CFR 431.53

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*** THIS SECTION IS CURRENT THROUGH THE SEPTEMBER 5, 2006 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 42 -- PUBLIC HEALTH
CHAPTER IV -- CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES
SUBCHAPTER C -- MEDICAL ASSISTANCE PROGRAMS

PART 431 -- STATE ORGANIZATION AND GENERAL ADMINISTRATION SUBPART B -- GENERAL ADMINISTRATIVE REQUIREMENTS

Go to the CFR Archive Directory

42 CFR 431.53

§ 431.53 Assurance of transportation.

A State plan must--

(a) Specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and

(b) Describe the methods that the agency will use to meet this requirement.

HISTORY: 56 FR 8847, Mar. 1, 1991.

AUTHORITY: (Sec. 1902(a)(4) of the Act)

NOTES: NOTES APPLICABLE TO ENTIRE CHAPTER: [PUBLISHER'S NOTE: Nomenclature changes affecting Chapter IV appear at 45 FR 53806, Aug. 13, 1980; 50 FR 12741, Mar. 29, 1985; 50 FR 33034, Aug. 16, 1985; 51 FR 41338, Nov. 14, 1986; 53 FR 6634, Mar. 2, 1988; 53 FR 47201, Nov. 22, 1988; 56 FR 8852, Mar. 1, 1991; 66 FR 39450, 39452, July 31, 2001; 67 FR 36539, 36540, May 24, 2002.]

APPENDIX K

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*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH MARCH 31, 2004 ***

AGENCY FOR HEALTH CARE ADMINISTRATION
MEDICAID
CHAPTER 59G-4 MEDICAID SERVICES

59G-4.060, F.A.C.

59G-4.060 Dental Services.

(1) This rule applies to all dentists enrolled in the Medicaid program for dental services under Section 409.906, F.S.

(2) All dental services providers enrolled in the Medicaid program must be in compliance with the Florida Medicaid Dental Services Coverage and Limitations Handbook, October 2003, and the Florida Medicaid Provider Reimbursement Handbook, Dental 111, October 2003, which are incorporated by reference, and the Florida Medicaid Provider Reimbursement Handbook, CMS-1500, which is incorporated by reference in Rule 59G-4.001, F.A.C. All handbooks are available from the Medicaid fiscal agent.

AUTHORITY: Specific Authority 409.919 FS.
Law Implemented 409.906, 409.908, 409.912 FS.

HISTORY
New 7-10-80, Amended 2-19-81, 10-27-81, 7-21-83, Formerly

10C-7.523, Amended 9-11-90, 11-3-92, Formerly 10C-7.0523, Amended 6-29-93, Formerly 10P-4.060, Amended 7-19-94, 7-16-96, 3-11-98, 10-13-98, 12-28-98, 6-10-99, 4-23-00, 4-24-01, 7-5-01, 2-20-03, 8-5-03, 1-8-04.

APPENDIX L

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*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH MARCH 31, 2004 ***

AGENCY FOR HEALTH CARE ADMINISTRATION
MEDICAID
CHAPTER 59G-4 MEDICAID SERVICES

59G-4.330, F.A.C.

59G-4.330 Transportation Services.

(1) This rule applies to all entities which provide transportation services to Florida Medicaid recipients.

(2) All transportation services providers enrolled in the Medicaid program must comply with the provisions of the Florida Medicaid Transportation Coverage, Limitations and Reimbursement Handbook, July 1997, incorporated by reference. The handbook is available from the Medicaid fiscal agent.

AUTHORITY: Specific Authority 409.919 FS.
Law Implemented 409.902, 409.905, 409.907, 409.908, 409.9081, 409.910, 409.913 FS.

HISTORY
New 1-1-77, Amended 10-1-77, 1-27-81, 8-28-84, Formerly 10C-7.45, Amended 4-13-93, Formerly 10C-7.045, Amended 1-7-98.

APPENDIX M

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO.
F0038785A,B,C,D,E,F,G,H,I,J

GABRIEL HARDEN,
et al,
Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS
Motion to Dismiss

The above-entitled cause came on for hearing before the Honorable DAVID C. MILLER, Presiding Judge, at 1351 N.W. 12th Avenue, Miami, Florida, on January 10, 2003, commencing on or about 1:30 p.m.

* * * *

THE COURT: I'm trying to figure this out. Drivers got paid per head?

MR. VITALE: Right

THE COURT: For every kid?
MR. VITALE: Right.

THE COURT: Did they also get reimbursed for the Pokeman cards, candy, or anything handed out? Any reimbursement for any of that?

MR. VITALE: Only driver out of the five listed was Falcon Gonzalez.

THE COURT: What does Gonzalez say?

MR. VITALE: She said that extra money was built in to the fee. She got to pay the five dollars.

THE COURT: Did she get more money per head than any other driver?

MR. VITALE: I'm not sure about that.

THE COURT: What do drivers get per head?

MR. VITALE: $25.

THE COURT: Did she get anything more than $25 per head?

MR. VITALE: Yes , she did.

THE COURT: What's her name?

MR. VITALE: Falcon Gonzalez

THE COURT: What did she say she got above $25 per head?

MR. VITALE: She said she got $5.

THE COURT: Any proof of that? Just the cash?

MR. VITALE: Most of the drivers got paid in cash. The reason I'm bringing to the Court's attention these documents is that the State has indicated that these people were not employees. So, the next item that is in this employee packet is general journal transactions from the accountant at Dental Express where Vera Dent's pay is listed.

* * * *

THE COURT: What are we going do with the C-4 motions?

MR. COBB: Well, Mr. Gelby is not here. I will stand on his responses.

THE COURT: Everybody file everything they want to file in connection with those motions? They've been collected by staff counsel.

MR. BUSTAMENTE: As I indicated the last time we were here I want to see what the Appellate Court does before I file a specific motion on behalf of my client. Because what I file is going to depend on what the Court decides the law of the case.

THE COURT: The difference is the C-4 motions we would have to account for the different situations that the various defendants themselves in.

MR. VITALE: Correct.

THE COURT: In this order that I've been given, proposed order, does not do that in any way.

MR. COBB: So do you just want to hold in abeyance all of the C-4 motions to dismiss until the Appellate Court comes down with its decision.

THE COURT: I think we should it all up in one big package. I'll leave it to the defendants how they want to handle it.

MR. BUSTAMANTE: Judge, most respectfully, I think if you find that the law is unconstitutional, then there is no C-4 motion to be filed. If on the other hand the Court finds as the State's position is, that the prosecution is constitutional, then I have to go to lesser issues.

For example, issues of knowledge, issues of mens rea and so on and so forth with regard to my client. But if the Court finds that the law itself is unconstitutional, then at this point I think it's really not appropriate time for me file that motion.

MR. COBB: I think that's probably true. If they're going to find what we're doing is unconstitutional and prevent us from prosecuting, it stops right there until the appeal court says yea or nea.

THE COURT: Well, if I'm wrong on this call, which the State would suggest that I am, then maybe the Appellate Court ought to drop down to the next argument without having to send it back here.

MR. COBB: I'm not sure that they would reach it necessarily. But if they felt they didn't have to go past constitutionality, I'm not sure whether they should consider it.

MR. SCHAFER: The main issue in our C-4 motion solely

on whether the drivers were employees or independent contractors. I suppose the Court could deal with that before or after the Court of Appeals decides. The Court of Appeals could say yes it's unconstitutional if they're employees.

Then we would be back before Your Honor with a sworn motion. If they find it's unconstitutional on its face because of the mens re, then the case would be over with. So perhaps in the interests of judicial economy you could wait and see which way the Appellate Court rules. It may avoid having to come back.

THE COURT: Everyone is nodding their head yes.

MR. COBB: I don't have a problem either way.

MR. BUSTAMANTE: I agree with Mr. Cobb, Judge, that if they determine, for example, that the statute is constitutional, they may not get to the other issues anyway.

THE COURT: Anything else before we close shop on this case for now?

MR. COBB: No.

* * * *

APPENDIX N

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. F00038785
INFORMATION

OSWP CASE NO. 2000-0110-SFB

GABRIEL HARDEN (A)
EDWARD POLSKY (B)
MARIA RODRIGUEZ (C)
ELSA CORTORREAL (D)
BRUCE SMITH (E)
HERBERT GOSS (F)
FLORA JOHNSON (G)
VICTOR RIVERA (H)
BILLY MADISON (I)
VONSHELLA CARTER(J)

Defendants.

_____/

COUNT 1: Racketeering F.S. 895.03(3), 1°Fel. (A)(B)(C)(D)(E)(F)(G)(H)(I)(J)

COUNT 2: Conspiracy to Commit Racketeering F.S. 895.03(4), 1°Fel. (A)(B)(C)(D)(E)(F)(G)(H)(I)(J)

COUNT 3: Medicaid Fraud-False Claims, 3° Felony, F.S. 409.920 (2) (e) and F.S. 777.011 (A)(B)(C)(D)(E)(F)(H)(I)

COUNT 4, 7: Medicaid Fraud-False Claims, 3° Felony, F.S. 409.920 (2) (e) and F.S. 777.011 (A)(B)(C)(D)(E)(F)(G)

COUNT 5-6:

Medicaid Fraud-False Claims,
3° Felony, F.S. 409.920 (2)
(e) and F.S. 777.011
(A)(B)(C)(E)(F)(G)

COUNT 8-9:
Medicaid Fraud-False Claims,
3° Felony, F.S. 409.920 (2)
(e) and F.S. 777.011
(A)(B)(J)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA

COUNT 1

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that beginning on or about December 01, 1998, and continuing through and including on or about June 01, 2000, as part of a related transaction occurring in two or more judicial circuits, or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS, FLORA JOHNSON, VICTOR RIVERA, BILLY MADISON,** and/or **VONSHELLA CARTER,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Robert Victome, Veria Dent, Kimbele Edwards, Falcon Gonzalez, Felisia Jackson, Karen Smith, and others known and unknown to the prosecution did unlawfully and knowingly while employed by or associated with an enterprise, as defined by Section 895.02(3), Florida Statutes, to-wit: a group of individuals associated in fact although not a legal entity, did conduct or participate, directly or indirectly, in such enterprise, through a continuous pattern of racketeering activity, as defined by Florida Statute 895.02(4), Florida Statutes, by engaging in at least two incidents of racketeering activity which had similar intents, results, accomplices, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics and were not isolated incidents, including at least two of the following

predicate incidents:

PREDICATE A

Beginning on or about December 1, 1998 and continuing through and including June 1, 2000, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS, VICTOR RIVERA,** and/or **BILLY MADISON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Veria Dent and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

PREDICATE B

Beginning on or about February 1, 1999 and continuing through and including February 1, 2000, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh,

Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS,** and/or **FLORA JOHNSON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Kimbele Edwards and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

PREDICATE C

Beginning on or about February 1, 1999 and continuing through and including June 1, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, BRUCE SMITH,** and/or **HERBERT GOSS,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Falcon Gonzalez and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for

referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

PREDICATE D

Beginning on or about February 1, 1999 and continuing through and including April 1, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, BRUCE SMITH, HERBERT GOSS,** and/or **FLORA JOHNSON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Felisia Jackson and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

PREDICATE E

Beginning on or about December 1, 1998 and continuing through and including February 1, 2000, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS,** and/or **FLORA JOHNSON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Karen Smith and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(c) and 777.011, F.S.

PREDICATE F

Beginning on or about August 19, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY,** and/or

VONSHELLA CARTER, and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to-wit: **T.S.-Medicaid Number 214474211** and/or **M.R.-Medicaid Number 742916163**, to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(a) and 777.011, F.S.

PREDICATE G

Beginning on or about August 19, 1999 and continuing through and including on or about September 28, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY,** and/or **VONSHELLA CARTER,** and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to-wit: **L.S..-Medicaid Number 214474210**, to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(a) and 777.011, F.S.

COUNT 2

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that beginning on or about December 1, 1998, and continuing through and including on or about June 1, 2000, as part of a related transaction occurring in two or more judicial circuits, or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS, FLORA JOHNSON, VICTOR RIVERA, BILLY MADISON,** and/or **VONSHELLA CARTER,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Robert Victome, Veria Dent, Kimbele Edwards, Falcon Gonzalez, Felisia Jackson, Karen Smith, and others known and unknown to the prosecution did unlawfully, willfully, and knowingly agree, conspire, combine or confederate, one with the other to violate the laws of the State of Florida to wit: the laws prohibiting any person employed by or associated with an enterprise as defined by Section 895.02(3), Florida Statutes, from conducting or participating, directly or indirectly, in the affairs of such enterprise through a pattern of racketeering activity, in violation of Section 895.03(4), Florida Statutes. As part of said conspiracy, the aforementioned defendants, and others known and unknown to the prosecution, were employed by or associated with the enterprise, and through such enterprise did either engage in at least two incidents of racketeering activity as set forth in Count I of this Information or otherwise participated in the affairs of such enterprise with the knowledge and intent

that other members of the conspiracy would engage in at least two incidents of racketeering activity as defined by Section 895.02(4), Florida Statutes, which had similar intents, results, accomplices, or methods of commission, or were otherwise interrelated by distinguishing characteristics and were not isolated incidents, to wit: a systematic, ongoing course of conduct which involved paying individuals to solicit child Medicaid recipients by enticing hem with gifts of food and/or money, and then transporting them to dental facilities where services were performed on the recipients which would then be billed to the medicaid program for payment, and which caused the Medicaid program and/or its fiscal agent to issue checks for said services, with intent to defraud one or more persons, to wit: the State of Florida Medicaid program or with intent to obtain property from one or more of these same persons by false or fraudulent pretenses, representations or promises, or willful misrepresentations of a future act and did obtain property, to-wit: United States Currency with an aggregate value of more than $50,000.00 and included crimes chargeable under chapters 817.034 and 490.920, Florida Statutes, namely Organized Scheme to Defraud and Medicaid Fraud, in violation of §895.03(4), F.S.

COUNT 3

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about December 1, 1998 and continuing through and including June 1, 2000, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL,**

BRUCE SMITH, HERBERT GOSS, VICTOR RIVERA, and/or **BILLY MADISON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Veria Dent and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

COUNT 4

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about February 1, 1999 and continuing through and including February 1, 2000, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS,** and/or **FLORA JOHNSON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Kimbele Edwards and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or

covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

COUNT 5

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about February 1, 1999 and continuing through and including June 1, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, BRUCE SMITH,** and/or **HERBERT GOSS,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Falcon Gonzalez and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for

by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

COUNT 6

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about February 1, 1999 and continuing through and including April 1, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, BRUCE SMITH, HERBERT GOSS,** and/or **FLORA JOHNSON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Felisia Jackson and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

COUNT 7

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant

Statewide Prosecutor, under oath, charges that on or about December 1, 1998 and continuing through and including February 1, 2000, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY, MARIA RODRIGUEZ, ELSA CORTORREAL, BRUCE SMITH, HERBERT GOSS,** and/or **FLORA JOHNSON,** while employed by or associated with DENTAL EXPRESS DENTISTS, DDS, PA, DENTAL EXPRESS INC., EXPRESS DENTAL, INC. and/or BRIGHT SMILES, P.A., along with Karen Smith and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(e) and 777.011, F.S.

COUNT 8

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about August 19, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN,**

EDWARD POLSKY, and/or **VONSHELLA CARTER,** and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to-wit: **T.S.-Medicaid Number 214474211** and/or **M.R. - Medicaid Number 742916163**, to dental facilities for treatment which was paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(a) and 777.011, F.S.

COUNT 9

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about August 19, 1999 and continuing through and including on or about September 28, 1999, as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including but not limited to the Second, Eleventh, Fifteenth Judicial Circuits, to-wit: Leon, Miami-Dade and West Palm Beach Counties, Florida, the defendants **GABRIEL HARDEN, EDWARD POLSKY,** and/or **VONSHELLA CARTER,** and others known and unknown, did knowingly and unlawfully solicit, offer, pay, or receive any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing of any service for which payment may be made, in whole or in part, under the Medicaid Program, to-wit: did pay or receive a per head fee based upon Medicaid eligibility for solicitation and transportation of Medicaid recipient(s) to-wit: **L.S..-Medicaid Number 214474210**, to dental facilities for treatment which was

paid for by the State of Florida or its fiscal agent under the Medicaid Program, in violation of §409.920(2)(a) and 777.011, F.S.

Dated this _____ day of December, 2000.

MELANIE ANN HINES
STATEWIDE PROSECUTOR
STATE OF FLORIDA

_____

STEFANIE C. LOGAN
ASSISTANT STATEWIDE PROSECUTOR
Florida Bar Number 0074195
110 S.E. 6th Street, Suite 1400
Ft. Lauderdale, FL 33301
(954) 712-4950

STATE OF FLORIDA
COUNTY OF BROWARD

Personally appeared before me, Stefanie C. Logan, Assistant Statewide Prosecutor for the State of Florida, personally known to me, who being first duly sworn say that this prosecution is instituted in good faith and certifies that testimony was received under oath from material witnesses for the offenses, and the allegations as set forth in the foregoing Information, if true, would constitute the offenses therein charged.

Sworn to and subscribed before me this _____ day of _____, 2000.

Seal
Notary Public State of Florida
Personally Known_____

APPENDIX O

STATE MEDICAID FRAUD STATUTES

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
AL	Code of Ala. § 22-1-11 (2006)	None	Yes
AK	No statute found	N/A	N/A
AZ	A.R.S. §13-3713 (2006)	Knowingly	No
AR	A.C.A. § 5-55-111 (2006) and A.C.A. § 20-77-902 (2006)	Purposely Knowingly	Yes Yes
CA	Cal Wel & Inst Code § 14107.2 (2006)	None	Yes

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STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
CO	C.R.S. 26-4-1103 (2006)	Intentionally or with Reckless Disregard	Yes
CT	Conn. Gen. Stat. § 53a-161c (2006)	Knowingly	Yes
DE	31 Del. C. § 1005 (2006)	None	Yes
DC	D.C. Code § 4-802 (2006)	None	No
FL	Fla. Stat. § 409.920 (2000)	Knowingly	No
GA	No statute found	N/A	N/A
HI	No statute found	N/A	N/A
ID	No statute found	N/A	N/A
IL	305 ILCS 5/8A-3 (2006)	None	Yes

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
IN	Burns Ind. Code Ann. § 12-17.6-6-12 (2006)	Knowingly or Intentionally	No
	Burns Ind. Code Ann. § 12-15-24-2 (2006)	None	No
IA	No statute found	N/A	N/A
KS	K.S.A. § 21-3847 (2006)	Knowingly and Intentionally	No
KY	KRS § 216.2950 (2006)	Knowingly	Yes
	KRS § 205.8461 (2006)	Knowingly	Yes
LA	La. R.S. 14:70.5 (2006)	Intentional	Yes
ME	No statute found	N/A	N/A

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
MD	Md. Criminal Law Code Ann. § 8-511 (2006)	None	No
MA	ALM GL ch. 118E, § 41 (2006)	None	Yes
MI	MCLS § 400.604 (2006)	None	No
MN	Minn. Stat. § 62J.23 (2005) (authorizes adoption of administrative rules that may be more restrictive than federal requirements)	N/A	N/A
MS	Miss. Code Ann. § 43-13-207 (2006)	None	No

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
MO	§ 191.905 R.S.Mo. (2006)	Knowingly	No
	§ 198.148 R.S.Mo. (2006)	Purposely	Yes in § 198.151 R.S.Mo.
	§ 198.145 R.S.Mo. (2006)	Purposely	Yes in § 198.151 R.S.Mo.
MT	Mont. Code Anno., § 45-6-313 (2005)	Purposely or Knowingly	Yes
NE	No statute found	N/A	N/A
NV	Nev. Rev. Stat. Ann. § 422.560 (2006)	None	No
NH	12 RSA 167:61-a (2004)	Knowingly	No
NJ	N.J. Stat. § 30:4D-17 (2006)	None	Yes

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
NM	N.M. Stat. Ann. § 30-41-2 (2006)	Knowingly	Yes in § 30-41-3
	N.M. Stat. Ann. § 30-41-1 (2006)	Knowingly	Yes in § 30-41-3
	N.M. Stat. Ann. § 30-44-7 (2006)	None	No
NY	NY CLS Soc Serv § 366-d (2006)	None	Yes
	NY CLS Soc Serv § 366-f (2006)	Intent to defraud	Yes
NC	No statute found	N/A	N/A
ND	No statute found	N/A	N/A

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
OH	ORC § 2913.40 (2006)	With purpose to commit fraud or Knowing that the person is facilitating a fraud	No
OK	56 Okl. St. § 1005 (2005)	Willfully and Knowingly	Yes in Okl. St. § 1-742
OR	No statute found	N/A	N/A
PA	62 P.S. § 1407 (2005)	None	No
RI	R.I. Gen. Laws § 5-48.1-3 (2006)	Knowingly and Willfully	Yes
	R.I. Gen. Laws § 40-8.2-3 (2006)	Intentionally	Yes
SC	S.C. Code Ann. § 44-113-60 (2006)	None	No

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
SD	S.D. Codified Laws § 22-45-4 (2006)	None	No
TN	No statute found	N/A	N/A
TX	Tex. Hum. Res. Code § 32.039 (2006)	Knowingly See §32.0391	Yes in § 32.029(x)(3)
UT	Utah Code Ann. § 26-20-4 (2005)	None	No
VT	No statute found	N/A	N/A
VA	Va. Code Ann. § 32.1-315 (2006)	Knowingly and Willfully	Yes
WA	Rev. Code Wash. (ARCW) § 74.09.240 (2006)	None	Yes
WV	W. Va. Code § 9-7-5 (2006)	None	No
WI	Wis. Stat. § 49.49 (2006)	None	Yes

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
WY	No statute found	N/A	N/A

(2)

No. 06-770

FILED
MAR 2 0 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

GABRIEL HARDEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT GABRIEL HARDEN

ANTHONY C. VITALE
THE HEALTH LAW OFFICES OF
ANTHONY C. VITALE
799 Brickell Plaza
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QUESTION PRESENTED

The restated question presented is:

Whether the Supremacy Clause bars states from criminalizing as Medicaid fraud conduct that falls within the safe harbor exceptions to the Federal Anti-Kickback Statute (a provider paying its employees to solicit and transport Medicaid eligible children for dental services) and which, therefore, would not be deemed criminal under federal law?

INTERESTED PARTIES

Additional parties below, co-defendants in the state criminal proceedings, were:

Vonshella Carter

Elsa Cortorreal

Herbert Goss

Flora Johnson

Billy Madison

Edward Polsky

Maria Rodriguez

Bruce Smith

(Co-defendant Victor Rivera pled guilty and was not a party in the court below.) (Pet. App. G, 67a).

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STATEMENT

A. Introduction

Title XIX of the Social Security Act ("the Medicaid Act") requires states that receive federal funding for health care to provide, *inter alia*, routine dental care to the poor. The Act bars Medicaid providers from making payments or "kickbacks" to third parties in exchange for patient referrals. In addition to punishing such payments as felonies, the Act "excludes" from the Medicaid program (and, indeed, from *all* federal health care programs) any provider convicted of a federal or state crime committed in connection with the program. *See* 42 U.S.C. § 1320a-7(a)(1) and (b)(1).

As a counterweight to the breadth of the federal anti-kickback provisions and severity of the sanctions, Congress created nine exceptions to the definition of a "kickback," and authorized the Secretary of the Department of Health and Human Services ("HHS") to create additional "safe harbors." One such exception, 42 U.S.C. § 1320a-7b(3)(B) (Pet. at 4), as well as one of the now twenty-two safe harbors, 42 C.F.R. § 1001.952(i) (Pet. at 6), expressly immunizes the payments a Medicaid provider makes to his own employees from being either prosecuted as "kickbacks" or used as the basis for "exclusion" from the Medicare or Medicaid programs. Furthermore, the Act requires proof that a provider acted "knowingly and willfully" in prosecutions for violations of the "anti-kickback" provisions. *See* 42 U.S.C. § 1320a-7b(b)(1) and (2).

Respondent Gabriel Harden operated a dental clinic in Miami, Florida. Through a staff of paid employees, he solicited Medicaid-eligible patients and provided them with

assistance in traveling to his dental care center for routine dental services. Under its contract with Medicaid, the State of Florida was required to provide these services. Harden accurately billed the services to Medicaid, and the services were, in fact, performed. Florida prosecutors nonetheless levied criminal charges against him and nine co-defendants, under a state anti-kickback statute, FLA. STAT. § 409.920(2)(e) ("the Florida Medicaid Anti-Kickback Law") (*see* Pet. at 4-5), which omitted *all* of the nine federal exceptions and twenty-two safe harbors, while authorizing prosecutions for mere negligence. (*See* Pet. App. 4a). However, the charges were dismissed, a ruling that was upheld by the Florida District Court of Appeal and the Florida Supreme Court, which agreed that the Florida statute was preempted by federal law. The courts below applied well-established precedents of this Court defining the "conflict preemption" doctrine. Moreover, the Florida Supreme Court's decision did not contradict the will of the Florida Legislature. Under a more specific "anti-kickback" statute, FLA. STAT. § 817.505, which was enacted after the Florida Medicaid Anti-Kickback Law and became effective in 1996, the Florida Legislature criminalized "kickbacks" for patient referrals but, in concert with the Federal Anti-Kickback statute and regulations, expressly excluded from prosecution "[a]ny . . . payment practice not prohibited by 42 U.S.C. § 1320a-7b(b) or regulations promulgated thereunder."[1] And, in 2004, in response to the District Court of Appeal decision in this case, the Florida Legislature amended section 409.920(2)(e) to

1. This later enacted statute is consistent with the decision of the Florida Supreme Court and with the enactment of state anti-kickback statutes in 26 other states, many of which passed legislation after the development of the Federal Anti-Kickback Statute "safe harbor" regulations in 1991 to conform to the federal statutory and regulatory scheme. *See* Appendix, *infra*.

permit prosecutions only for "willful" violations, consistent with federal law. (*See* Pet. App. at 4a, and n. 2). Accordingly, the State has overstated the import of the decision below, and the Petition should be denied.

B. The Medicaid Program in Florida

The Medicaid Program is a "cooperative federal-state program" through which Congress provides financial assistance to the states so that they may furnish medical care to the poor. *See Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 503 (1990). Although participation in the program is "voluntary," participating states "must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services (Secretary)." *Id.* Florida has elected to participate in the Program and the federal government currently pays close to 60 percent of all Florida expenditures for services administered under the Medicaid Act.

Routine dental care is one of the mandatory services Congress requires states to provide as a condition of receiving federal funds. *See* 42 U.S.C. §§ 1396d(k)(3); 1396d(a)(10); 1396a(a)(43). In addition to requiring states to provide the actual services, the Medicaid Act requires states to "*inform[] all persons in the State* who are under the age of 21 and who have been determined to be eligible for medical assistance . . . *of the availability of [required] services* as described in section 1396d(r) of this title" and the "*arranging for* (directly or through referral to appropriate agencies, organizations, *or individuals*)" all necessary treatment. 42 U.S.C. § 1396a(a)(43) (emphasis supplied).

Despite these requirements, Florida's own statistics reflect that between 1999-2004 more than 75% of Florida's

Medicaid-enrolled children were furnished no dental care whatsoever. *See* Florida Form 416, Federal Centers for Medicare and Medicaid. Indeed, according to a comprehensive 1996 report issued by HHS, Office of Inspector General, no state provided more than 50 percent of the services required by the Medicaid program. *See* OIG Report No. OEI-09-93-00240, April 1, 1996. The Report found several reasons for the lack of responsibility by the states, including that Medicaid-eligible families tended to give dental care a low priority and were "unwilling to wait for appointments or make necessary travel or child care arrangements which increases the likelihood of missed appointments and failure to seek services." *Id.* at 2, 6. In 2005, this history of neglect resulted in a class action lawsuit against the Florida agency in charge of administering the Medicaid program, charging Florida officials with systematically violating the rights of Florida children by refusing to provide mandatory services, specifically including dental services, as well as failing to provide basic outreach and information to the plaintiff class, as required by § 1396a(a)(43). That lawsuit is ongoing. *See Florida Pediatric Society v. Levine*, S.D. Fla. Case No. 05-23037-Civ-Jordan.

C. The Prosecution

Gabriel Harden earned a Bachelor's Degree in Business Administration and Health Care Management from the University of Colorado. He returned to his native Miami and, in 1997, opened Dental Express, Inc., a management company that operated a turnkey dental facility with the latest dental technology and equipment, office space, administrative staff, inventory and supplies, computers, services, marketing, advertising, accounting, taxes, billing and collections services. His goal was to provide a full range of dental care to inner city children.

By early 1998, after contracting with a group of licensed dentists and dental assistants, Harden had begun providing dental services to inner city youth through contracts with Dade County Head Start, approximately 150 day care centers in Dade and Broward Counties, some twenty-two schools, and numerous school boards. Harden transported the necessary dental equipment to the day care centers and schools, and provided basic dental services on site. However, later that same year, the Florida Legislature banned the use of mobile dental units, which had been providing such services in cooperation with school systems around the state (FLA. STAT. § 409.906(1), (6)), and then notified Harden that his portable services fell within the ban. Since Harden could no longer bring the dentists to the children, he sought to bring the children to the dentists. Accordingly, in December 1998, he began employing staff to market his services and transport Medicaid-eligible patients to his facilities.

Two years later, the state of Florida filed criminal charges against Harden and his co-defendants. (Pet. App. N at 98a-113a) (Information) The State did not allege that there was anything fraudulent about the services Harden billed to Medicaid. Rather, the State alleged that the wages Harden paid to his own staff to solicit Medicaid-eligible patients for services later properly billed to Medicaid constituted illegal "kickbacks" under Florida's Medicaid fraud statute, section 409.920(2)(e), Fla. Stat. (*See* Pet. App. N). That statute, among other things, made it unlawful to "knowingly . . . pay . . . any remuneration . . . in return for referring an individual to a person for the furnishing or arranging for the furnishing of any . . . service for which payment may be made . . . under the Medicaid program."

Although modeled after the federal anti-kickback statute, section 409.920(2)(e) failed to exclude from prosecution the payment practices—the nine statutory exceptions and twenty-two regulatory "safe harbors"—that Congress and HHS have deemed lawful under the Federal Anti-Kickback Statute.[2] Moreover, the 2000 version of the Florida statute defined the term "knowingly" in a manner that included merely negligent conduct: "'Knowingly' means done by a person who is aware *or should be aware* of the nature of his or her conduct and that his or her conduct is *substantially certain* to cause the intended result." FLA. STAT. § 409.920(1)(d) (emphasis supplied). However, as noted above, and as acknowledged by Petitioner (Pet. at 14; Pet. App. at 4a), in 2004 the Florida Legislature amended the definition to eliminate the highlighted language and to define "knowingly" as "willfully." Accordingly, Florida's *mens rea* requirement now matches federal law. *See* p. 15 *infra*.[3]

D. THE PREEMPTION LITIGATION

Harden moved to dismiss the Information (Pet. App. H, pp. 76a-85a), arguing that a Medicaid provider's payment of wages to its employees for the "solicitation and transportation" of Medicaid-eligible children "to dental facilities for treatment" was expressly protected by federal statutes and regulations, that apply to the Medicare and

---

2. Indeed, as discussed *infra*, Congress sought, in part, to *encourage* the payment practices covered by the exceptions and safe harbors.

3. Petitioner correctly notes that the amendment does not moot this case. (Pet. at 14). *See* FLA. CONST. art. 10, § 9 ("Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.").

Medicaid programs, and that the State's attempt to criminally prosecute this federally-protected activity was unconstitutional under the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2. Although the State conceded that the defendants were scrupulous in treating only Medicaid-eligible patients, it nonetheless argued that the Florida Legislature was free to ban all payments made, even to employees, for the solicitation of patients. Indeed, during a hearing on Harden's motion to dismiss, the State contended that patient solicitation was a crime under state law even if done through conventional forms of advertising:

> MR. COBB: [B]ut the point is, what they're paid to do is to go out and find patients. In other words, these aren't patients that are waiting somewhere to just go pick up and [bring] back, that the doctors have arranged to have waiting. They're going out in the neighborhoods, they are going up to people, finding people. They're going out and finding Medicaid eligible recipients, individually — speaking to them. . . . The remuneration to the patients it's not really the issue here. It's the remuneration to the drivers to do this, all right. And they are only paid, they're paid per capita for each person they go out and find that's Medicaid eligible and bring them in. The method of bringing them in could be any way. Okay, so they're bringing them in by buses, so what.
>
> The transportation is not the issue here.[4] The issue is that they're going out and finding people

4. In the courts below the State argued that a Medicaid provider could pay no wages of any kind to employees, if the purpose for the wages was for the "solicitation" of Medicaid-eligible patients. (Cont'd)

> on an individual basis, right to Medicaid eligible recipient[s]. Are you Medicaid eligible, fine, come with me and they're bringing them in and they're getting paid per head to do that. That is a crime.
>
> THE COURT: *If they were to go out and put a flyer on every door on a block and then somehow arrange to pick up the people that raised their hands, I want to do that, would that be a problem for the State?*
>
> MR. COBB: *If. It might be, yes. If. And if the way they were paid. Were they paid to go out and just hand out flyers, probably not, but if they were paid on a per capita basis for the number of patients that they directly brought in, I think it would be. . . .*

R2-274-275. (emphasis supplied).

As the hearing evolved so did the State's position on what conduct would be considered legal under the Medicaid program. Thus, the State argued that it was legal to solicit Medicaid eligible patients from a location "say a nursing home that has Medicaid patients . . . already there and you solicit that nursing home . . . that is okay . . . [b]ecause you are not really having any impact on the number of people

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(Cont'd)

In this Court, the State has changed its position, arguing that the factor that made the payments abusive was that the employees were supplying *transportation* to the patients. (*See* Pet. at 10). But, as previously noted, transportation was a service the State itself was required to provide under the Medicaid Act, but was not doing so, according to a pending class action lawsuit. *See* pp. 3-4, *supra*.

who are potentially eligible for Medicaid that come into the system, you see." (R2-275-276.) However, the State contended that the same type of solicitations would be criminal if the targeted population was not *already* enrolled in the Medicaid program:

> MR. COBB: [I]n other words, those [nursing home] people already exist. They're already an expended [sic] group. You're just getting people who have expanded [sic] groups to come to a particular place. That has been ruled to be okay.[5] What is not okay is to go out and try to find people who aren't already coming in somewhere, grabbing them, and having them come in directly and being paid per head for that. That is exactly the method of payment and that's really is the crux of this whole case. What is in a nutshell what we say is being done wrong here and it violates the law and violates the statute. That is it.

(R2-276).

The trial court granted Harden's motion to dismiss, in a lengthy Order (Pet. App. D, pp. 35a-58a), agreeing that section 409.920(2)(e) was preempted by federal law and, therefore, was unconstitutional as applied under the Supremacy Clause. The court further held that the *mens rea* requirement of section 409.920(1)(d) was preempted by federal law and was also unconstitutional under the Supremacy Clause. (Pet. App. D, pp. 52-53). On appeal, both the Third District Court of Appeal and the Florida Supreme

5. The State has never identified any "ruling" that permits the solicitation of patients already receiving Medicaid benefits while banning the solicitation of new patients.

Court affirmed the trial court's rulings. *See* Pet. App. A (Supreme Court), B (Order denying rehearing), C (Third District Court of Appeal).

REASONS FOR DENYING THE PETITION

The state of Florida seeks review of two distinct aspects of the decision by the Florida Supreme Court. First, it argues that the Florida courts misapplied this Court's Supremacy Clause precedents and that states should be free to ban Medicaid providers from engaging in Medicaid payment practices that Congress and HHS have expressly declared are permissible under the Medicaid program. Second, it argues that the decision misapplied the statutory exception and administrative safe harbor for "employer-employee" payments. According to Petitioner, the only wages that fall within the exception and safe harbor are those paid to *medical* employees who provide services that can *themselves* be billed to Medicaid. *See* Pet. at 5-20. In other words, it is Petitioner's contention that while it would be legal for a dentist to pay a duly licensed medical assistant to clean his patients' teeth (since teeth cleaning is a "covered service"), it would be a criminal "kickback" for the dentist to pay the receptionist who made the appointments (since the receptionist's wages cannot be billed to Medicaid). Neither of the State's arguments warrants this Court's review.

I.

THE FLORIDA SUPREME COURT PROPERLY APPLIED THE "IMPLIED CONFLICT PREEMPTION" DOCTRINE

A. THE "IMPLIED CONFLICT-PREEMPTION" DOCTRINE

The Supremacy Clause of the Constitution provides that the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 427 (1819), "it has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation omitted). Both federal statutes and regulations can have preemptive effect. *See Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) ("[f]ederal regulations have no less preemptive effect than federal statutes").

The Court has recognized three discrete categories of preemption: (1) express preemption, where a federal statute contains "explicit preemptive language;" (2) field preemption, in which the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it;" and (3) implied conflict preemption, in which compliance with both federal and state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 98 (1992) (quotations and citations omitted).

In determining whether state law is preempted by implication, the Court's ultimate task is "to determine whether state regulation is consistent with the structure and purpose" of the federal regulatory scheme "as a whole." *Gade*, 505 U.S. at 98; *accord Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996). The touchstone is Congressional intent. *See Gade*, 505 U.S. at 96. Thus, state law will be preempted by implication where, "under the circumstances of th[e] particular case," the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that 'obstacle' goes by the name of conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference, or the like." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (internal quotations omitted).

B. Conflict Preemption and the Medicaid Program

Petitioner contends that the application of conflict-preemption principles to void state statutes affecting the Medicaid program is contrary to congressional intent, and that "no court has previously accorded" the federal anti-kickback statute "preemptive effect." (Pet. at 7). While it may be true that no other court has addressed the preemptive effect of the *anti-kickback* provisions of the Medicaid Act, this Court, in *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 478 (1996), remanded for the entry of an injunction against the enforcement of a state law relating to abortion services to the extent that it conflicted with the Medicaid Act. Numerous other federal and state courts have likewise held that various state laws were preempted by the

Medicaid Act and its regulations.[6] The State cites no authority to the contrary.

Petitioner's contention that the decision below violated conflict preemption principles rests on a central but false premise. According to Petitioner, the structure and history of the federal scheme contemplates not only state involvement in the prosecution and punishment of conduct that falls *outside* the payment practices permitted under the

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6. *See e.g.*, *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002) (applied federal preemption principles to the dentistry requirements of the Medicaid program and holding that North Carolina's plan violated and was preempted by more expansive federal dentistry standards); *Planned Parenthood Affiliates v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996) (holding that a provision of Michigan law was invalid under the Supremacy Clause because it conflicted with the Medicaid Act); *Randall v. Lukhard*, 709 F.2d 257 (4th Cir. 1983) (holding that a Virginia rule was invalid because it conflicted with a provision of the Medicaid Act), *aff'd in part*, 729 F.2d 966 (4th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 872 (1984); *Smith v. Travelers Indemnity Co.*, 763 F. Supp. 554, 558 (M.D. Fla. 1989) (because Florida's "collateral source rule permits private automobile liability insurers to become secondary sources of recovery behind Medicare, Florida's collateral source rule obstructs the Congressional purpose" behind the Medicare Act and, therefore, is preempted) (citation omitted); *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 69 P.3d 927 (2003) (holding that federal Medicaid statutes and regulations preempted lien provisions of California plan); *Martin v. State*, 642 N.W.2d 1, 34-36 (Minn. 2002) (Minnesota law allowing the state to assert a subrogation right to personal injury awards preempted by anti-lien provision of federal Medicaid Act because "the federal law prohibits exactly what the state law allows"); *Public Health Trust v. Jackson Mem. Hosp.*, 693 So. 2d 562 (Fla. 3d Dist. Ct. App. 1996) (holding that federal law preempted a Florida regulation that allowed hospitals to hold third parties liable for patient services in excess of the amounts paid by the Medicaid program).

federal anti-kickback statute and regulatory "safe harbors," but also permits states to expand the categories of prohibited conduct to include payment practices that fall squarely *within* the protections of federal law. *See* Pet. at 19-20. However, as demonstrated below, Congress' objective in enacting and amending the federal anti-kickback statute was to establish a uniform system providing certainty for providers about what financial practices were legal. While Congress welcomed state involvement as a partner in investigating and penalizing practices that were forbidden under federal law, Congress never envisioned that states would criminalize practices that Congress and the federal agencies overseeing the Medicare and Medicaid programs have expressly deemed permissible. Such a scheme would create chaos in the medical industry, particularly for providers operating in multiple states. Thus, the Florida Supreme Court correctly reasoned that a Florida statute that sought to do just that stood as an "obstacle" to congressional objectives and improperly prevented the payment of acceptable Medicaid claims.

C. The Employer-Employee Exception and Safe Harbor

Both the Medicare and Medicaid programs are subject to the terms of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b, which prohibits certain conduct and payment of claims therefore. When Congress initially enacted these provisions in 1972, they were much narrower than the present form, as they only prohibited the solicitation or offering of a "kickback, bribe or rebate," and only punished a violation as a misdemeanor. *See* Pub. L. No. 92-603, § 242(b), (c), 86 Stat. 1419 (codified at 42 U.S.C. § 1396h(b)).

In 1977, Congress elevated the penalty to a felony and broadened the scope of the prohibition to include "any

remuneration," but then carved out an express statutory exception for "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services." Pub. L. 95-142 (Oct. 25, 1977). *See* 42 U.S.C. § 1320a-7b(b)(3). However, by 1980, Congress recognized that the statute was so broad that it created uncertainty for healthcare providers and, accordingly, upgraded the *mens rea* to "knowingly and willfully." The legislative history of the amendment indicates that the intent behind the amendment was to clarify what conduct was criminal and when it could be prosecuted: "The Committee is concerned that criminal penalties may be imposed under current law to an individual whose conduct, *while improper, was inadvertent.* Accordingly, Title VIII clarifies present law *to assure that only persons who knowingly and willfully* engage in the proscribed conduct are to be subject to criminal sanctions." H.R. REP. No. 96-1167, p. 202, *reprinted in* 1980 U.S.C.C.A.N. 5526, 5572 (emphasis supplied).

In 1987, in response to concerns over fraud in federal health care programs, as well as continuing complaints from the health care industry about the overbreadth of the statute, Congress enacted a comprehensive series of amendments. *See* Pub. L. No. 100-93. To address the former concern, Congress expanded the types of offenses that would result in a provider's exclusion from participation in the Medicare or Medicaid program to specifically include convictions under either federal *or state* law "in connection with the delivery of a health care item or service . . . of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." *See* 42 U.S.C. § 1320a-7(a)(1) and (b)(1).

Congress simultaneously amended the anti-kickback provision, authorizing the Secretary of the Department of Health and Human Resources ("HHS") to promulgate "safe harbors" for permissible financial relationships. In granting HHS the authority to create new exceptions to what would otherwise constitute illegal remunerations or kickbacks, the Senate Report specifically recognized:

> It is the understanding of the [Finance] Committee that the breadth of this statutory language has created uncertainty among health care providers as to which commercial arrangements are legitimate, and which are proscribed. The Committee bill therefore directs the Secretary, in consultation with the Attorney General, to promulgate regulations specifying payment practices [1] that *will not be subject to criminal prosecution* under the new section 1128B(b) *and* [2] that *will not provide a basis for exclusion from participation in Medicare or the State health care programs* under the new section 1128(b)(7).

S. REP. No. 100-109, *reprinted in* 1987 U.S.C.C.A.N. 682, 707-708 (emphasis and numbering supplied).

Not satisfied with only the statutory exception for "employer-employee" payments, in 1991, final rules were promulgated creating a parallel administrative "safe harbor" for employer-employee relationships. The rule, now codified at 42 C.F.R. § 1001.952(i), also not only barred such payments from being "treated as a criminal offense" but also prevented such payments from serving "as the basis for an exclusion." Thus, the safe harbor regulation provides in pertinent part:

§ 1001.952 Exceptions.

> The following payment practices [1] *shall not be treated as a criminal offense* under section 1128B of the Act and [2] *shall not serve as the basis for an exclusion*: .
>
> . . .
>
> (i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, *for employment in the furnishing of any item or service for which payment may be made in whole or in part* under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2).

(emphasis and numbering supplied).

The employee "safe harbor" also was intended to be expansive and to give every benefit of the doubt to the employer. As OIG explained in issuing section 1001.952(i) as a final rule for the first time in 1991: "The proposed exception for employees permitted an employer to pay an employee *in whatever manner he or she chose for having that employee assist in the solicitation of program business*. . . ." Final Rule, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952 (July 29, 1991) (Proposed Safe Harbors) (emphasis supplied). And, the scope of the safe harbors was

to prevent the criminal prosecution of a Medicaid employer for paying wages to its employees by characterizing the wages as unlawful "kickbacks." *See Id.* (General Comments Response No. 1: "If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of the provision"); *id.* (Response No. 9: "The clear congressional intent behind the development of these safe harbor provisions is to define innocuous arrangements that should not be prosecuted, including the statutory exceptions").

D. *HARDEN* WAS CORRECTLY DECIDED

1. The Exceptions and Safe Harbors

In support of its contention that Congress intended for state legislatures to have the discretion to criminalize precisely the same payment practices that Congress (in statutory exceptions) and HHS (through twenty-two duly promulgated rues) declared to be lawful, Petitioner relies, not on the language or history of the anti-kickback statute, but on an entirely different statute, 42 U.S.C. § 1396b(q)(3). *See* Pet. at 19. Section 1396b(q)(3) authorizes states to create "medicaid fraud unit[s]" to "prosecute individuals for criminal violations" under state law and/or to refer "suspected criminal violations relating to the program . . . to the appropriate" federal authorities. Petitioner strains to construe a snippet of language in this subsection— encouraging states to utilize "all applicable State laws regarding any and all aspects of fraud in connection with" federal health care programs—as an expression of congressional intent to allow states to enact laws criminalizing conduct that would otherwise satisfy a federal statutory exception or safe harbor.

However, nothing in that language, or in any other federal statute, suggests that Congress intended that states were free to *define* as "fraudulent" the *conduct* that Congress and HHS expressly stated was lawful.

To find *any* expression of such a goal in the legislative history of the anti-kickback statute, Petitioner reaches back over 35 years, citing language from a committee report relating to the 1972 legislation, stating that the anti-kickback penalties "would be in addition to and not in lieu of any other *penalty provisions* of state or federal law." H.R. REP. No. 92-231, 5094 (May 26, 1971). While this language suggests that states were free at the time to impose *penalties* greater than those imposed by federal anti-kickback statute, nothing in the report suggested that Congress intended to allow states to prohibit *conduct* that Congress expressly determined was permitted. Indeed, Congress did not recognize the need for exceptions and administrative safe harbors until nearly twenty years later. *See* p. 14-16 *supra*.

The only direct support for Petitioner's construction of Congressional intent is language from an HHS commentary in response to comments received in connection with additional safe harbors promulgated in 1991. *See* Pet. at 9, 19.[7] However, there is no indication that HHS undertook any sort of preemption analysis when it drafted this response. Additionally, the provisions of the federal anti-kickback statute at issue here, 42 U.S.C. § 1320a-7b, were not promulgated by HHS as rules, but instead were enacted as

7. *See* Medicare & State Health Care Programs: Fraud & Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991) (stating that "conduct that is lawful under federal anti-kickback statute or regulation may still be illegal under State law").

statutes by Congress. Congress' intent was set forth in the Senate Committee Report which, as previously stated, indicates that Congress' objective in requiring safe harbors was to provide certainty to providers by describing specific payment practices that would "not provide the basis" for either "criminal prosecution" or "exclusion" from the program. *See* p. 16 *supra*. The Senate Report plainly takes precedence over any conflicting interpretation of Congressional intent regarding preemption offered by HHS.

Indeed, Petitioner's construction of the federal exceptions and safe harbors directly conflicts with the Senate Report. As previously noted, in 42 U.S.C. § 1320a-7(a)(1) and (b)(1), Congress has mandated that even a successful *state* prosecution of a provider will result in the automatic exclusion of that provider from not only Medicaid but from all federal health care programs. However, the Senate Report expressly stated that freedom from "exclusion" was one of the principal objectives of the 1987 amendments that created the safe harbors. Surely Congress did not intend to protect the payment practices set forth in the safe harbors from being used as the basis for exclusion only if the conduct was prosecuted federally, while *requiring* exclusion if the same conduct was prosecuted under state statutes. On the contrary, allowing states to penalize conduct that Congress and HHS went to so much trouble to protect would stand as an "obstacle" to Congress' stated objectives.

Nor is the Medicaid Act unique in preempting state prosecutions for conduct protected by federal law. In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 364-65 (2000), the Court held that a state statute penalizing individuals and conduct that Congress explicitly exempted from sanctions was preempted by federal law: "sanctions are drawn not only

to bar what they prohibit but to allow what they permit . . ." *Id.* at 366. The Court recognized that the fact that the statutes were aimed at a common end "hardly neutralizes conflicting means." *Id.* at 365. Likewise, the fact that Florida and federal law are both aimed at preventing fraud does not give Florida the power to criminalize conduct that federal law explicitly permits. *See id.* at 366.

Defining "fraud," especially in connection with the operation of a federally funded program, is *not* "a field which States have traditionally occupied." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). *Buckman* concluded that a state cause of action seeking damages for injuries allegedly caused by bone screws that had been approved by Food and Drug Administration (FDA), predicated on a "fraud-on-the-FDA" theory, was preempted by federal statutes. The Court reasoned that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." *Buckman*, 531 U.S. at 348 (internal citation omitted). *See also Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, 1205 (9th Cir. 2002) (plaintiff's state law tort of intentional interference with prospective business advantage based on a "fraud against the [Environmental Protection Agency]" theory was preempted by standards in the Federal Insecticide, Fungicide, and Rodenticide Act); *cf. McCall v. Pacificare of Cal., Inc.*, 25 Cal. 4th 412, 426, 21 P.3d 1189, 1200, 106 Cal. Rptr. 2d 271 (2001) ("[t]o the extent that the [plaintiff's] complaint alleges fraud on the HCFA, defendants may, on remand, assert it is preempted under the rule in *Buckman*").[8]

8. Numerous courts have held that state law tort claims are preempted by the Medicaid Act, where the claims are based, in whole (Cont'd)

Similarly, the State's construction of the interplay between federal and state law would undermine Congress' stated goal of eliminating "uncertainty among health care providers as to which commercial arrangements are legitimate, and which are proscribed." *See* p. 16, *supra*. This Court has already characterized the Medicaid Act as "among the most intricate ever drafted by Congress" with a "Byzantine construction." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981). Allowing each state legislature to determine the legality of payment practices described by Congress or HHS as legal under the Medicaid program would effectively Balkanize the program into as many as 50 subdivisions with potentially different or conflicting standards.[9] Large multi-state providers, in particular, will not know whether their claims for services will be rejected or subject them to civil or criminal penalties. It strains credulity to suggest that Congress intended to allow states to determine the validity of claims paid by the *federal* government.

(Cont'd)

or in part, on a theory that the torts arose from an improper denial of benefits under the Medicaid Act. *See, e.g., Midland Psych. Assoc., Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998); *Bodimetric Health Servs. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990); *Marin v. HEW, Health Care Fin.*, 769 F.2d 590 (9th Cir. 1985). *See also Wilson v. Chestnut Hill Healthcare*, Civ. A. No. 99-CV-1468, 2000 U.S. Dist. LEXIS 1440 (E.D. Pa., Feb. 10, 2000) ("courts must discount any 'creative pleading' which may transform Medicare disputes into mere state law claims, and painstakingly determine whether such claims are ultimately Medicare disputes").

9. For example, Petitioner could try to apply Florida's Unfair and Deceptive Trade Practices Act, FLA. STAT. §§ 501.201-501.203 (2003). *Cf. Congress of Cal. Servs. v. Catholic Healthcare West*, 87 Cal. App. 4th 491, 510 (Cal. App. 2d 2001) (holding an unfair business practices claim preempted by Medicare).

Compare Lawrence Co. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 270 (1985) (holding a state statute placing additional limits on federal funds disbursed by Congress to local governments was preempted).

Finally, Petitioner contends that the decision below would "call[] into question" the constitutionality of statutes from other states. *See* Pet. at 22. But Petitioner fails to identify a single reported case—other than this one—where a state prosecuted a defendant for conduct falling within a federal exception or safe harbor. This case was an anomaly, and the decision below properly found the prosecution to be impermissible.

2. Negligence vs. Willfulness

The Florida Supreme Court also correctly ruled that the Florida Legislature's initial attempt to dilute the *mens rea* requirement for proving kickback violations—from the federal "willfulness" requirement to a negligence standard—constituted a separate violation of the Supremacy Clause. As previously discussed, Congress' decision to elevate the *mens rea* from "knowledge" to "willfulness" in 1980 was intentional, and guided by policy concerns over the breadth of the federal statute. *See* p. 15, *supra*. At the very least, the term "willfulness" means "that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 193 (1998). By criminalizing the "accidental" or "negligent" (*i.e.*, non-willful) payment of allegedly unlawful "remunerations"—under circumstances where the Florida Legislature did not even attempt to define the operative term "remuneration" to exclude conduct that is lawful under federal law—section 409.920(2)(e), as

originally enacted, stood as an "obstacle" to the achievement of Congress' stated objectives. *Cf. Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002) (holding invalid under the Supremacy Clause a City ordinance that required companies suspected of committing hazardous waste contamination to prove by "clear and convincing evidence" that others were responsible for the contamination, rather than by a preponderance of the evidence, as required by federal law, 42 U.S.C. §§ 9601-9675), *cert. denied*, 538 U.S. 961 (2003); *Lukhard*, 709 F.2d at 267 (holding that Virginia's burden of proof provisions in its transfer of assets rule under the Medicaid Act were invalid in light of less restrictive federal requirements), *modified in part*, 729 F.2d 966 (4th Cir. 1984) (*en banc*) (construing Virginia's burden of proof provision so as not to conflict with federal standard).

In any event, the Florida Legislature amended the statute in 2004, eliminating the discrepancy between state and federal standards. Accordingly, this issue—although not jurisdictionally "moot" as to the Respondents' case—is no longer a controversy in Florida and, therefore, does not present a sufficiently concrete dispute to warrant granting the Petition. *See Sanks v. Georgia*, 401 U.S. 144 (1971) (dismissing appeal after oral argument because new factual and legal developments, including new state legislation, made it inappropriate to decide the original issue); *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing a writ of certiorari as improvidently granted due to intervening amendments by the Florida Legislature to death penalty statute at issue).

II.

CONGRESS DID NOT INTEND TO CRIMINALIZE MARKETING, ADVERTISING OR ASSISTANCE GIVEN TO MEDICAID-ELIGIBLE PATIENTS TO RECEIVE MEDICAL SERVICES THAT STATES ARE REQUIRED TO PROVIDE UNDER FEDERAL LAW

While Petitioner contends that the Florida Supreme Court misapplied the Supremacy Clause by engrafting the federal "employer-employee" exception and safe harbor onto section 409.920, the Petition primarily focuses on the exception and safe harbor. According to Petitioner, the wages a Medicaid provider pays to its employees are protected from prosecution as kickbacks *only* if the employees are medical personnel—presumably the doctors, dentists, nurses and licensed technicians—who are being paid to dispense services that can *themselves* be billed to Medicaid. For example, under the State's construction of the exception and safe harbor, while it is lawful for a provider to pay a dental technician to x-ray and clean a child's teeth, it is a crime for the dentist to pay a receptionist to telephone the child's parents to schedule the next appointment, since Medicaid will not reimburse the provider for the time expended in "soliciting" the patient. Indeed, under Petitioner's proposed construction, all forms of marketing would be illegal. In addition to its absurdity, there are numerous flaws in the State's argument.

First, Petitioner's construction is not compelled by the plain meaning of the employer-employee safe harbor language. Title 42 C.F.R. section 1001.952 immunizes payments for all those "employ[ed] *in the furnishing of* any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs." (emphasis supplied) Any *bona fide* employee of

a dental practice is "employed" in the "furnishing" of services, whether the employee is a dentist, a dental assistant, bookkeeper, receptionist or advertiser.

Second, the only case Petitioner cites in support of its construction, *United States v. Starks*, 157 F.3d 833 (11th Cir. 1998) (Pet. at 17-18), is inapposite. In *Starks*, a corporation that operated a drug treatment program gave kickbacks (essentially bribes) to two employees of the State of Florida Department of Health and Rehabilitation Services ("HRS") to refer patients to the corporation. 157 F.3d at 835-836. The defendants argued that the federal anti-kickback statute was unconstitutionally vague, claiming that "ordinary people in their position might reasonably have thought" that the two HRS "employees" qualified for the statutory exception and safe harbor for employer-employee relationships. *Id.* at 839. The Eleventh Circuit soundly rejected this argument for the obvious reason that the recipients of the kickbacks were not *bona fide* employees of the corporation, but rather were government HRS employees. *Id.* In dicta, the Eleventh Circuit added that the defendants also provided no "covered items" or "legitimate service for which the Hospital received any Medicare reimbursement." *Id.* This dictum, however, cannot be divorced from the principal holding (that the defendants were not corporate employees) or the facts of the case—the defendants were corrupt government HRS workers misusing their public offices for private gain. Nothing of the sort took place here.

Third, if the Court were to adopt the State's radical construction, then *all* forms of Medicaid marketing would be criminalized, from the "flyers" discussed during the trial court oral argument, to television or internet advertising. However, not a whiff of such a purpose can be found in either

the Act's legislative history or HHS commentary. Indeed, the Act itself contemplates outreach to "inform" the eligible population of the "availability" of basic services and the "arranging" of treatment. *See* 42 U.S.C. § 1396a(a)(43). In light of the serious First Amendment ramifications of criminalizing ordinary marketing for medical services, the Court should not assume that Congress intended that anomalous result.

Fourth, the Petition addresses the method of payment by a provider, contending that a Medicaid employer may perhaps pay *salaries* to employees but that *commission*-based wages are illegal. While Congress or HHS could arguably create such a distinction, to date neither has chosen to do so. All Petitioner can point to for the creation of this distinction is an "advisory" opinion—not a duly promulgated rule—issued by HHS in 1996. *See* Pet. at 10. The criminal charges at issue in this case require far more notice than that under the Due Process Clauses of the Fifth and Fourteenth Amendments. Indeed, it was for that reason that the trial court in this case also ruled that section 409.920 was unconstitutional as applied. *See* Pet. App. D, pp. 56a-57a. Moreover, what scarce precedent exists in this area contradicts the State's argument.

For example, in *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), the court dismissed a *qui tam* fraud action brought against a hospital. The hospital had entered into contracts with doctors, whereby the hospital would purchase the doctors' practices, transform the doctors into hospital employees and, in return, require the doctors to refer patients to the hospital as a condition of their employment. The opinion makes clear that the amounts paid to the doctors under the employment aspect of the contracts were expressly based on "a percentage of fees collected for referred patients." 211 F. Supp. at 1047. The doctors were paid

on a commission basis, similar to the manner in which Harden paid the drivers in this case. *See also New Boston Gen. Hosp., Inc. v. Texas Workforce Comm.*, 47 S.W.3d 34 (Tex. App. 2001) (contract between hospitals and recruiter was not voidable as in violation of the anti-kickback provision of the Medicaid Act because the recruiter was an "employee" under "safe harbor" provisions of the Act). The decision below properly relied upon *Obert-Hong* and *New Boston General* in concluding that there, as here, payments to *bona fide employees* were within the federal safe harbor, and therefore legal. *See* Pet. App. A, p. 23a.

CONCLUSION

The decision below correctly held that the Florida anti-kickback statute is preempted by the Federal Anti-Kickback Statute and corresponding regulatory exceptions, barring respondents' prosecution. The decision does not conflict with this Court's precedents, and the fact that the Florida statute has been amended to comport with federal law eliminates any future uncertainty about the preemption question. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ALA. CODE § 22-1-11; ARIZ. REV. STAT. § 13-3713; ARK. CODE ANN. §§ 5-55-111, 20-77-902; CAL. WEL. & INST. CODE § 14107.2; COLO. REV. STAT. § 25.5-4-305; CONN. GEN. STAT. § 53a-161c; DEL. CODE ANN. tit. 31, § 1005; 305 ILL. COMP. STAT. § 5/8A-3; KAN. STAT. ANN. § 21-3847; KY. REV. STAT. ANN. §§ 216.2950, 205.8461; LA. REV. STAT. ANN. §§ 14:70.5, 46:438.2; MASS. GEN LAWS ch. 118E, § 41; MINN. STAT. § 62J.23; MO. REV. STAT. §§ 191.905, 198.151, 376.823; MONT. CODE ANN. § 45-6-313; NEV. REV. STAT. § 422.560; N.J. STAT. ANN. § 30:4D-17; N.M. STAT. ANN. §§ 30-41-1–3, 30-44-7; N.Y. SOC. SERV. §§ 366-d, 366-f; OKLA. STAT. tit. 56, § 1005 & OKLA. STAT. tit. 63 § 1-742; R.I. GEN. LAWS §§ 5-48.1-3, 40-8.2-3; S.D. CODIFIED LAWS § 22-45-4; TEX. HUM. RES. CODE § 32.039; VA. CODE ANN. § 32.1-315; WASH. REV. CODE § 74.09.240; WIS. STAT. § 49.49. The states who acted in a similar fashion as the State of Florida (See FLA. STAT. § 817.505), thereby adopting the federal statutory and regulatory exceptions under the Federal Anti-Kickback Statute, include Arkansas, Connecticut, Kentucky, Missouri, Montana, New York, Oklahoma, Rhode Island, Texas, and Virginia. ARK. CODE ANN. §§ 5-55-111, 20-77-902; CONN. GEN. STAT. § 53a -161c; KY. REV. STAT. ANN. §§ 216.2950, 205.8461; MO. REV. STAT. §§ 191.905, 198.151, 376.823; MONT. CODE ANN. § 45-6-313; N.Y. SOC. SERV. §§ 366-d, 366-f; OKLA. STAT. tit. 56, § 1005 & OKLA. STAT. tit. 63 § 1-742; R.I. GEN. LAWS §§ 5-48.1-3, 40-8.2-3; TEX. HUM. RES. CODE § 32.039; VA. CODE ANN. § 32.1-315. Of the remaining states, 12 have enacted anti-kickback statutes with no exceptions (D.C. CODE ANN. § 4-802; FLA. STAT. § 409.920; IND. CODE § 12-17.6-6-12; MD. CODE ANN., CRIM. LAW § 8-511; MICH. COMP. LAWS § 400.604; MISS. CODE ANN. § 43-13-207; N.H. REV. STAT. ANN. § 167:61-a; OHIO REV. CODE ANN. § 2913.40;

PA. STAT. ANN. tit. 62, § 1407; S.C. CODE ANN. § 44-113-60; UTAH CODE ANN. § 26-20-4; W. VA. CODE § 9-7-5), and 13 have never enacted any such statute. Furthermore, Petitioner states that "two states, Missouri and New Mexico, have a mix of laws with and without safe harbors" (Pet. at 22); however, this is inaccurate. Missouri has enacted three anti-kickback statutes which all have "safe harbor" exceptions, and New Mexico has enacted three anti-kickback statutes two of which have "safe harbor" exceptions. MO. REV. STAT. §§ 191.905, 198.151, 376.823; N.M. STAT. ANN. §§ 30-41-1–3, 30-44-7.

(1)

No. 06-770

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

vs.

GABRIEL HARDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is The Florida Anti-Kickback Statute, § 409.920(2)(e), Florida Statutes (2000) Preempted by the Federal Anti-Kickback Statute 42 U.S.C., § 1320a-7b(b)(2) (2000), Since: (1) The Federal Statute Contains a "Knowing and Willful" *Mens Rea* Requirement That is Not Part of The Florida Statute, and (2) The Federal Statute Contains "Safe Harbor" Provision Not Present in The Florida Statutory Scheme?

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STATEMENT OF THE CASE

The Respondent, EDWARD POLSKY, is a licensed dentist who was working at a dental clinic, DENTAL EXPRESS OF SOUTH FLORIDA. The patients treated by Dr. Polsky were primarily children. The clinic also engaged the services of at least two other dentists.

Although the only role attributable to the "dentists" was providing dental care, they were nonetheless named in a nine-count information which included conspiracy, racketeering, and Medicaid fraud charges under § 409.920(2)(e), Florida Statutes (2000). The State characterized the parties' illegality as a "pay for patient" scheme. Respondent Edward Polsky never admitted participating in *any* "scheme", or that any "scheme" existed – no less a scheme to "pay for patients".

The Criminal Information

In December 2000, the Office of the Statewide Prosecutor filed a nine-count information against ten (10) individuals associated with or "employed by" Dental Express of South Florida, Dental Express, Inc., and Express Dental, Inc. – three corporate entities providing dental services to children. The information charged the Respondents with conspiracy, racketeering and Medicaid fraud under § 409.920(2)(e), Florida Statutes (2000). The State alleged that the Respondents engaged in a "pay for patients" scheme, in which individuals received "per head" payments in exchange for soliciting and driving Medicaid-eligible children for dental treatment at the clinics.

Although not spelled out in the information, the Respondent herein, Dr. Edward Polsky, has been acknowledged by the State as being a dentist rendering the actual dental services to patients. The State's case focused on the role of van drivers and how they were compensated. Nothing is stated in the information about the role of Respondent Polsky.

A sworn motion to dismiss was filed in the trial court. The Florida Rules of Criminal Procedure, Rule 3.190(C)(4) provide a procedural mechanism for a defendant to present a set of material facts not in dispute and, based upon those undisputed facts, to establish that a *prima facie* case of guilt against the defendant is absent.

Respondent GABRIEL HARDEN, joined in by the other defendants, pursued such a motion. The case was disposed of on the following undisputed set of material facts:

a. Dental Express and/or Harden hired drivers to pick up patients and transport them to Dental Express to receive dental care.

b. Dental Express and/or Harden conducted background checks on the van drivers, made copies of their credentials, and required the drivers to sign tax forms.

c. Dental Express and/or Harden leased vehicles owned by the drivers to transport children to the facilities, and paid substantial sums in leasing the vehicles.

d. The wages paid to drivers, as well as the lease payments for the vehicles, were documented as business expenses of Dental Express.

e. The drivers were "employees" of the clinics, within the meaning of 42 U.S.C. § 1320a-7b(b)(3)(B) and 42 C.F.R. § 1001.952(i).

f. The drivers were paid on variable rates, depending upon the services provided to the patients.

The trial court accepted as undisputed fact that the Dental Express drivers were "employees", and were paid "per head" for each eligible child transported to the clinic. The trial court granted the Motion to Dismiss and found that the State's prosecution was preempted by both an express provision of the Federal Medicaid Act, 42 U.S.C. § 1320a-7b(b)(3)(B), as well as a parallel administrative "safe harbor" provision, 42 C.F.R. § 1001 952(i). Accordingly, the court held that F.S. 409.920(2)(e) was unconstitutional as applied by the State under the "Supremacy Clause", Article VI, Clause 2 of the United States Constitution. In addition, the court held that a second aspect of Florida's Medicaid Fraud Statute, the *mens rea* requirement found in F.S. § 409.920(1)(d), was preempted by federal law and was unconstitutional on its face under the Supremacy Clause.

All counts of the information against all defendants were dismissed. The State appealed to the District Court of Appeal of Florida, Third District.

The Third District Court of Appeal unanimously held that the trial court was correct in dismissing the information. *State v. Harden*, 873 So.2d 352 (Fla. 3d DCA 2004). The District Court found that the doctrine of implied conflict preemption was applicable, and the Florida Statutory Scheme conflicted with the federal statute in two significant ways:

1. The federal statute contained several so-called "safe harbor" provisions that exclude certain types of payments from being considered "illegal remuneration". 42 U.S.C. § 1320(a)-7b(b)(3)(B) (2000). Specifically, 42 U.S.C., §1320a-7b(b)(3)(B) (2000) protected employer/employee payments for the provision of covered items or services from criminal prosecution. The Florida statute had no such "safe harbor" provisions.

2. The Federal Anti-Kickback Statute contained a "knowing and willful" *mens rea* requirement. Under the federal statute, "in order to establish a 'willful' violation of the statute, the government must prove that a defendant acted with knowledge that his conduct was unlawful", citing *Bryan v. United States*, 524 U.S. 184, 192 (1998). In contrast, the Florida statute only required that the defendant act "knowingly". By definition, the Florida statute included "mere negligent" conduct, an activity the federal statute intended to protect.

For these reasons, the District Court found that there was implied conflict preemption and declared Florida Statute 409.920(2)(e) (2000) unconstitutional.

The State appealed to the Florida Supreme Court.

Supreme Court Decision

The Florida Supreme Court, without dissent, concluded that the "anti-kickback" provision of Florida Statute 409.920(2)(e) was in conflict with federal law and, therefore, preempted by it. *State v. Harden*, 938 So.2d 480 (Fla. 2006).

The Supreme Court made a detailed analysis of the Federal Anti-Kickback Statute – including an historic

overview. It then compared the federal statute with the Florida Statutory Scheme, and noted that the two statutes differed in two important aspects. First, the Florida Statute had a lower *mens rea* requirement which permits an anti-kickback violation based on negligent behavior. Second, the statute did not contain any "safe harbor" exceptions, and did not permit the type of "per head" referral payments made in this particular case, even if the payments were made to a *bona fide* employee.

For these reasons, the Supreme Court agreed with the District Court, that § 409.920(2)(e), Florida Statutes (2000) was preempted by federal law and, thus, unconstitutional under the Supremacy Clause.

The court noted that in 2004, the Florida Legislature amended the statute to conform to the federal *mens rea* requirement. *See*, Chapter 2004-344, § 8 at 2392, Laws of Florida as amended. The statute now provides that the term "knowingly" also includes "willfully".

Reasons For Denying The Writ

Without dissent, the Florida Supreme Court correctly held that the Florida Anti-Kickback Statute was preempted by the analogous federal statute. Applying well-honed principles of preemption, the Florida Supreme Court had no difficulty in finding that the state statute was in conflict with the federal statute, and that "compliance with both federal and state regulations is a physical impossibility", and the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", citing *Gade v. Nat'l. Solid Waste Management Ass'n.*, 505 U.S. 88, 89 (1992) (plurality opinion). This holding was neither startling, unprecedented or

remarkable. It was based on solid reasoning and consistent with preemption jurisprudence, as announced by this Court.

Preemption Law Was Properly Applied

It is a fundamental constitutional principle that Congress has the power to preempt state law. Article VI, cl. 2, United States Constitution; *Gibbons v. Ogden*, 9 Wheat 1, 211 (1824); *California v. Arc America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 161 (1989). A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law. *See*, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124 (1981). Three classes of preemption have been recognized by this Court: (1) "express preemption", where a federal statute contains explicitly preemptive language; (2) "implied field preemption", where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; and (3) "implied conflict preemption", where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Solid Waste Management Ass'n.*, *supra*, 505 U.S. at 98. Even when the federal act does not occupy the field, state law is naturally preempted to the extent of any conflict with a federal statute. *See*, *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 61 S.Ct. 399 (1941). Implied conflict preemption is found when it is impossible for a private party to comply with both state and federal law. *See*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288 (2000); *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270 (1990).

Florida's highest court found conflicts between the state statute and the federal statute that were glaring and obvious. The state statute, on its face and as applied, conflicted with the federal statute to such an extent that conduct legal by federal law was illegal under state law.

Facial Conflict - Differing *Mens Rea* Requirements

The *mens rea* requirement of a criminal statute is not a trifling matter. *See*, *Liparota v. United States*, 471 U.S. 419, 424, 105 S.Ct. 2084 (1989). The state and federal anti-kickback statutes were out of balance, as the Florida Anti-Kickback Statute had a lower *mens rea* requirement than the federal statute.

The Florida statute defined "knowingly" as an act "done by a person who is aware or *should be aware* of the nature of his of her conduct, and that his or her conduct is substantially certain to cause the intended result". § 490.920(1)(d), Florida Statute (2000) (Emphasis added). In contrast, the federal statute applies only to those acts that are done "knowingly and willfully". The term "willfully", when used in a federal criminal statute, is a term of art.

Generally, the word "willfully" itself denotes an act which is intentional, or knowing, or voluntary – as distinguished from accidental. *See*, *Felton v. United States*, 96 U.S. 699 (1877). When used in the context of a criminal act it denotes an undertaking with a "bad purpose". In order to establish a "willful" violation of a criminal statute, "the government must prove that the defendant acted with knowledge that his conduct was unlawful". *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S.Ct. 659 (1994); *Bryan v. United States*, *supra*.

It may well be that a "heightened" *mens rea* standard applies to the Federal Anti-Kickback Statute. At least two Circuit Courts of Appeal have required that a defendant not only know that the statute prohibits offering or paying remuneration for referrals – but, in addition, that they engaged in such referrals with the specific intent to violate the law. *See*, *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995); *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000). *See, also*, *Cheek v. United States*, 498 U.S. 192, 198, 111 S.Ct. 604 (1991).

The Petitioner suggests that the different *mens rea* standards between the two statutes is "inconsequential", because they criminalize the same intentional act of making referral payments. (p. 20, Petitioner's Writ) This argument is simply untenable, and ignores the basic tenets of criminal law. Under the federal statute, it is not enough that one intentionally makes referrals, but that the referrals must be done with knowledge that to do so is wrong. The culpable mental state threshold under the Florida statute is much lower than its federal counterpart. Mere negligent conduct can give rise to a criminal conviction, while under federal law that same conduct is not criminalized. While the "willfulness" standard under the federal statute is still up for grabs, it will never be less than the Florida state statute.

The State's argument, that the *mens rea* discrepancies between the former Florida statute and the federal statute are "inconsequential", is further undermined by its own charging document. Respondent Polsky's only association with the Dental Express was as a dentist. It is precisely this type of dragnet prosecution, where anyone even remotely connected with a Medicare provider could be charged, that Congress sought to avoid. This prosecution

is not "inconsequential" to Respondent Polsky, who had nothing to do with the management of Dental Express, who was not an owner or principal, but was merely brought in to render dental care. Congress intended to protect such remote individuals by requiring proof that not only did the dentist "knowingly and willfully" violate the statute, but that he "acted with an evil-meaning mind – that is to say, that he acted with knowledge that his conduct was unlawful". *See*, *United States v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998). The state statute provided no such protection, and criminalized that which was legal under federal law.

The Petitioner, State of Florida, does not contest the fact that in 1980 Congress amended the Anti-Kickback Statute by adding a "knowingly and willfully" *mens rea* element, and that the stated purpose of doing so was prompted by a concern that criminal penalties imposed under current law applied to an individual "whose conduct, while improper, was inadvertent", (*H.R. Rep.*, 96-1167 at 59 (1980), reprinted in 1980 U.S.C.C.A.N. 5526, 5572, Petitioner's Initial Brief, p. 9) – the precise conduct impermissible under the state statute.

The Petitioner has lost sight of the fundamentals by confusing the right of a state to have more stringent regulations than a federal statute, and the right of a state to have more stringent regulations which conflict with that federal statute. Nowhere in our system of government is a state permitted to criminalize that which is legal under federal law. A state can enhance a penalty for a parallel state/federal violation. A state can criminalize that which is not covered by federal statute. However, a state cannot prosecute an individual for conduct allowable under federal law. This is precisely what the Florida State

Anti-Kickback law did – both on its face and as applied to these particular Respondents. The Petitioner's position seeks havoc and a fundamental re-balance of state and federal power. Congress expressed no difficulty in having the state police their own laws and, in fact, required them to do so. *See*, 42 U.S.C., § 1396b(q)(3). This did not mean, as the Petitioner suggests, that the states were free to undermine practices specifically authorized by Congress.

Safe Harbor Provisions

The state statute contains no exceptions, or "safe harbors". These safe harbors were authorized by Congress to protect relatively innocuous commercial arrangements which may technically run afoul of the federal statute. These safe harbor exceptions are found at 42 C.F.R. §§ 1001.952(a)-(v) (2005). There are presently some twenty-three safe harbors. The purpose of these provisions was to give guidance and assistance to healthcare providers as to what business practices were legal. One of those safe harbors provides that an "illegal" remuneration (kick-back) "does not include any amount paid by an employer to an employee, who has a *bona fide* employment relationship with an employer". 42 C.F.R. § 1001.952(i) (2005). The regulation embraced the same definition of "employee" as used under the Internal Revenue Service Code.

The trial court found as undisputed that the van drivers were *bona fide* employees, and the Respondents herein were protected by the federal safe harbor provisions. Both the District Court and the Supreme Court concurred that the Respondents fell within the protection of the employee/employer relationship, and that having employees assist in the solicitation of business was proper

so long as a true employee/employer relationship existed. In support of this reading, the Supreme Court cited numerous pronouncements from the Office of the Inspector General of the Department of Health and Human Services (O.I.G.), Medicare, and state healthcare programs: Fraud and Abuse, O.I.G. Anti-Kickback Provisions, 56 Fed. Reg. 35, 952 and 35, 953 (July 19, 1991); Medicare and Medicaid Programs; Fraud and Abuse, O.I.G. Anti-Kickback Provisions, 54 Fed. Reg. 3088, 3093 (January 23, 1989). Turning to the case law, the Florida Supreme Court, finding no case directly on point, looked to such decisions in *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045 (N.D. Ill. 2002); *New Boston General Hospital, Inc. v. Texas Workforce Comm'n.*, 47 S.W.3d 34 (Tex. App. 2001), and compared them to such cases as *United States v. Starks*, *supra*, and *United States v. Polin*, 194 F.3d 863 (7th Cir. 1999).

The Florida Supreme Court noted "a glaring distinction" was between the arrangements upheld in *Obert-Hong* and *New Boston*, and those deemed illegal in *Polin* and *Starks*. The Court found the defining differences in the plans that were upheld as legal, that the payments were made to *bona fide* employees.

Based upon the limited precedent regarding the applicability of the employee safe harbor to various payments, and in light of the stated intention of the safe harbors, the Supreme Court agreed with the Third District Court and the trial court, that the "particular pay arrangement at issue involves protected employee/employer payments for the provisions of covered items". *State v. Harden*, *supra*, at 495.

The Petitioner's construction of the safe harbor provision is unnecessarily narrow and contrary to its plain language. The safe harbor provision found in 42 C.F.R., § 1001.952(i) protects a *bona fide* employee in the "furnishing of any item for which payment may be made in whole or part under Medicare, Medicaid or other federal healthcare programs". The state statute criminalizes the receipt of a "remuneration" in return for referring an individual for the furnishing of "any item or service for which payment may be, in whole or in part, under the Medicare Program . . . or in obtaining, purchasing, leasing, ordering or arranging . . . any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicare Program, § 409.920(2)(e), F.S. (2000)".

It seems obvious that the safe harbor and the Florida statute cover the same conduct. Either the conduct is covered by the safe harbor provision or it is simply not illegal under the state statute. Under the latter construction a safe harbor is provided, and under the former the conduct is not illegal.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE WRIT OF CERTIORARI SHOULD BE DENIED.

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(3)

No. 06-770

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Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,
v.

GABRIEL HARDEN, ET AL.
Respondents.

On Petition For a Writ of Certiorari to the Florida Supreme Court

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

REPLY TO RESPONDENT'S STATEMENT

In every court below, respondent Harden admitted he and his assistants paid van drivers $25 for each Medicaid-eligible child solicited and bought to his dental clinic. As before, Harden denies he was paying for patient referrals and argues that he was merely furnishing "travel assistance" that the state was required to provide "under its contract with Medicaid." See Brief in Opp. p.2 and n.4. The Third District held that providing transportation was protected activity under the federal employee safe harbor, and the Florida Supreme Court agreed. Pet. App. pp. 23a-24a, 33a. Harden does not claim anywhere in his response, however,

that he or any employee was an authorized transportation provider under Florida law, see Pet. App. pp. 86a-92a, providing a service "for which payment may be made in whole or in part under Medicaid." See 42 C.F.R. § 1001.952(i). Nor does he identify any law or regulation that requires Florida or any state to furnish transportation to every Medicaid-eligible patient.

Harden's van drivers were not providing a Medicaid-compensable service under 42 C.F.R. § 1001.952(i). To the contrary, they were providing Medicaid patients at $25 per head. That is precisely what the state argued to the trial court. See Brief in Opp., pp. 4-5.

REPLY TO RESPONDENT'S ARGUMENT

1. Harden's discussion of preemption principles as they may apply to the employee safe harbor regulation is largely beside the point since paying for patient referrals is not protected. Harden's reliance on a comment in the proposed rule about paying employees for solicitation of program business is misplaced. See Brief in Opp., p. 17. The final rule protects only payments to employees for furnishing services that are Medicaid-compensable. Solicitation is not such a service, nor is unauthorized transportation assistance.[1]

2. Assuming for argument that paying employees for patient referrals is protected, Harden contends that Congress did not intend to allow states to prosecute Medicaid providers for such conduct and upon conviction exclude them from the Medicaid program.

This conclusion is far from self-evident, and to the extent

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[1]For this reason, Harden's attempt to restate the Questions Presented is improper. His single question presumes his payment scheme was protected by the employee safe harbor.

the proposition is arguable, it begs for a definitive answer from this Court. In every preemption case, "the purpose of Congress is in the ultimate touchstone." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). Congress has never stated an intent to preempt state prohibitions on kickbacks for patient referrals. To the contrary, as the petition demonstrates, Congress has consistently condemned kickbacks and consistently recognized the effects kickbacks have on health care costs. And it has expressly authorized the states to prosecute "violations of all applicable State laws regarding any and all aspects of fraud." 42 U.S.C. § 1396b(q)(3). Further, as demonstrated in the petition, HHS has repeatedly asserted that its safe harbor regulations do not preempt more stringent state laws.

There is no contention here that a Medicaid provider could not comply with both federal and state law. A provider need only refrain from paying kickbacks. Thus, even if the safe harbor regulation protects kickbacks for patient referrals from federal prosecution, there is still a strong presumption against preemption. This is so because of the cooperative nature of the Medicaid program, the concerns for federalism, and the fact that the Florida statute at issue is not only "designed to foster health" but intended to protect the state fisc in order that state dollars pay for actual health care needs. See Pharm. Research and Mfrs. of America v. Walsh, 538 U.S. 644, 666 (2003) (presumption against preemption has "special force" when state and federal governments are pursuing common purposes); Medtronic, 518 U.S. at 485 (noting the historic primacy of state regulation of matters of health and safety). See also Wis. Dept. of Health and Family Servs. v. Blumer, 538 U.S. 473, 495 (2002) ("Medicaid . . . is designed to advance cooperative federalism . . . . When interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the states, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."). Cooperative federalism must surely recognize the states'

compelling interest in protecting their limited health care resources.

Harden's reliance on Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), and the potential for exclusion of Medicaid providers from the Medicaid program, which he contends is contrary to Congress' intent, does not make a case for preemption. Buckman, to the extent relevant, merely observed that the states have not traditionally policed fraud against federal agencies, and so a presumption against preemption of a state-law cause of action was not warranted. Medicaid, however, is a cooperative federal-state program in which the states themselves invest tens of billions of dollars every year. Money lost to fraud has a tremendous impact on state treasuries. The clear and manifest purpose of Congress, stated in the Medicaid law, authorizes states to prosecute their own laws on fraud, not fraud as defined by Congress. 42 U.S.C. § 1396b(q)(3). Hence, even if Congress would not exclude from the program a Medicaid provider who pays for patient referrals, the states may do so.

Respondent further asserts that multi-state providers will somehow suffer if state payment policies are not identical. Uniformity has never been a hallmark of the Medicaid program, however. States design and administer their own programs subject to HHS approval, and those programs have always differed. Moreover, states do not reimburse Medicaid providers for what they might expend for patient referrals, so there can be no legitimate concern about uniformity of payment policies.

3. Respondent's preemption argument on the mens rea standard of § 409.920(1)(d), Fla. Stat. (2000), pays no heed to 42 U.S.C. § 1396b(q)(3). Moreover, he does not dispute that the definitional language--"should be aware"--that the Florida Supreme Court found to allow prosecution of negligent or inadvertent conduct could not apply to the facts of this case.

Harden did not inadvertently pay $25 for every Medicaid-eligible child brought to his office. Thus, in finding the Florida law facially invalid, the Florida Supreme Court, contrary to the direction given in Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996), invalidated the statute further necessary to dispose of the case. In addition, whether Florida would ever prosecute merely negligent or inadvertent conduct is a matter of speculation. The existence of a hypothetical or potential conflict is insufficient to warrant preemption of a state statute. Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

4. Finally, in part II. of his brief, Harden sets up a strawman for the striking, contending that under its interpretation of 42 C.F.R. § 1001.952(i), Florida would criminally prosecute a dental office receptionist who schedules appointments or anyone engaged in such marketing activity as the distribution of flyers. With all due respect, what Florida and federal law clearly prohibit is payment "for referring an individual to a person for the furnishing . . . of any item or service for which payment may be made, in whole or in part, under the Medicaid program. . . . § 409.920(2)(e), Fla. Stat. (2000); see also 42 U.S.C. § 1320a-7b(b)(2). Receptionists who schedule appointments and employees who distribute flyers are not referring patients for Medicaid treatment. As to them, the safe harbor regulation is irrelevant. On the other hand, Harden's van drivers were paid to refer patients. That has been repeatedly admitted.

Florida's reading of 42 C.F.R. § 1001.952(i) is supported by two federal court decisions, United States v. Stark, 157 F.3d 833 (11th Cir. 1998), which respondent cannot meaningfully distinguish, and United States ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), the holding of which he misstates.[2] Florida's reading is also supported by the

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[2]The quotation from Obert-Hong at p. 27 of respondent's brief indicates the district court found that a hospital's physician-employees

two HHS Advisory Opinions discussed in its petition. Harden does not distinguish these either, dismissing them out of hand because they are not regulations. Nevertheless, HHS is directed by law to issue advisory opinions on safe harbor arrangements. 42 U.S.C. § 1320a-7d(b). Harden does not point to a single advisory opinion that supports his interpretation of the employee safe harbor regulation.

5. In concluding, Harden attempts to minimize the effect of the decision below. The decision is neither isolated nor insignificant. Florida's Fifth District Court of Appeal has applied the Harden reasoning to the submission of false statements to the state Medicaid agency, also finding § 409.920(1)(d) and (2)(a), Fla. Stat. (2000), preempted. See State v. Rubio, 917 So. 2d 383 (Fla. Dist. Ct. App. 2005).[3] The Florida Supreme Court, on the basis of its Harden decision, recently affirmed dismissal of another Medicaid fraud case in which a physician was charged with accepting $110,000 for referral of prescriptions that were paid out of Medicaid funds. See State v. Sachs, 948 So. 2d 723 (Fla. 2007).[4]

6. The brief of respondent Polsky adds little to Harden's argument. It represents that the Florida Supreme Court found that compliance with both state and federal law was a physical

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were paid a "percentage of fees collected for referred patients." In so writing, the district court was simply reciting allegations of the relator. 211 F. Supp. 2d at 1047. In holding the physicians entitled to payment under the safe harbor, the court found their compensation depended "on the value of the work performed by the individual doctor, not the value of any referrals." Id. at 1050.

[3]The Rubio decision is under review by the Florida Supreme Court. See State v. Rubio, Case No. SC06-157. The case has been briefed and was orally argued on November 2, 2006.

[4]A petition for writ of certiorari is being filed with this Court.

impossibility. The court did not so find. Rather, it found the Florida statute preempted "because it presents an obstacle to the accomplishments of the purposes of the federal law." Pet. App. p. 19a. Polsky also insists that it is undisputed that the van drivers were Harden's employees. As explained in the petition, the State disputed this. Pet. 11-12. For purposes of its ruling, the trial court only assumed the van drivers were employees. Id.

Polsky also asserts that as a matter of law a state can never criminalize what federal law permits. Brief in Opp., p. 9. He cites no authority for this blanket proposition. Respondents have heretofore argued only that Florida law presented an obstacle to accomplishment of the purposes of federal law. Whether states may not prosecute what is clearly fraudulent conduct--intentionally paying for patients--is a question that should be decided on a national basis.

Because of its misunderstanding of the safe harbor regulation and its misapplication of preemption principles, the decision below is not only wrong, it is also a dangerous precedent that is sure to foster litigation in other states. No amount of state court litigation, however, can either refine or resolve these issues. As shown in the petition, many states have not statutorily adopted safe harbors and only three use the federal mens rea term "knowingly and willfully." Pet. App. 115a et seq. Very few states appear to require proof that a defendant acted with knowledge that his conduct was unlawful. It is, therefore, of the utmost importance that this Court decide whether, and to what extent, state Medicaid fraud laws may be preempted.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision reversed.

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